

## Central Law Journal.

ST. LOUIS, MO., APRIL 29, 1898.

The opinion of Mr. Justice Brown, speaking for the United States Supreme Court, in the recent case of *Holden v. Hardy*, involves constitutional questions of especial interest regarding what is known as the "eight hour" law applicable to workingmen. The substance of the decision is that the Utah statute forbidding the employment of workingmen for more than eight hours per day in mines and in the smelting, reduction or refining of ores or metals, is within the police power of the State, and not an unconstitutional interference with the right of private contract or a denial of due process of law or the equal protection of the laws, within the inhibition of the fourteenth amendment to the constitution of the United States.

This amendment was first called to the attention of the supreme court in 1872, in an attack upon the constitutionality of a law of the State of Louisiana, passed in 1869, vesting in a slaughter house company therein named the sole and exclusive privilege of conducting and carrying on a live-stock landing and slaughter-house business within certain limits specified in the act, and requiring all animals intended for sale and slaughter to be landed at their wharves or landing places. *Slaughter-house Cases*, 16 Wall. 36. While the court in that case recognized the fact that the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, the further fact that it was not restricted to that purpose was admitted both in the prevailing and dissenting opinions, and the validity of the act was sustained as a proper police regulation for the health and comfort of the people. A majority of the cases which have since arisen have turned, not upon a denial to the colored race of rights therein secured to them, but upon alleged discriminations in matters entirely outside of the political relations of the parties aggrieved. These cases are divided by Mr. Justice Brown into two classes: First, where a State legislature or a State court is alleged to have unjustly discriminated in favor of or against a particular individual or class of individuals,

as distinguished from the rest of the community, or denied them the benefit of due process of law; second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual. Among those of the first class, which, for the sake of brevity, may be termed "unjust discriminations," are those wherein the colored race was alleged to have been denied the right of representations upon juries (*Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, *Id.* 313; *Ex parte Virginia*, *Id.* 339; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110, 1 Sup. Ct. Rep. 625; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. Rep. 904), as well as those wherein the State was charged with oppressing and unduly discriminating against persons of the Chinese race (*Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064; and *Chy Lung v. Freeman*, 92 U. S. 275), and those wherein it was sought, under this amendment, to enforce the right of women to suffrage, and to admission to the learned professions. *Minor v. Happersett*, 21 Wall. 162; *Bradwell v. State*, 16 Wall. 130.

To this class is also referable all those cases wherein the State courts were alleged to have denied to particular individuals the benefit of due process of law secured to them by the statute of the State (*In re Converse*, 137 U. S. 624, 11 Sup. Ct. Rep. 191; *Arrow-smith v. Harmoning*, 118 U. S. 194, 6 Sup. Ct. Rep. 1023), as well as that other large class, wherein the State legislature was charged with having transcended its proper police power in assuming to legislate for the health or morals of the community.

Cases arising under the second class, wherein a State has chosen to change its methods of trial to meet a popular demand for simpler and more expeditious forms of administering justice, are much less numerous, though of even greater importance, than the others. A few of such cases are *Walker v. Sauvinet*, 92 U. S. 90; *Kennard v. Louisiana*, 92 U. S. 480; *McMillan v. Anderson*, 95 U. S. 37; *Davidson v. New Or-*

leans, 96 U. S. 97; *Walston v. Nevin*, 128 U. S. 578; *Ex parte Wall*, 107 U. S. 265; *Hustado v. California*, 110 U. S. 516; *Hayes v. Missouri*, 120 U. S. 68; *Railway v. Mackey*, 127 U. S. 205; *Hallinger v. Davis*, 146 U. S. 314; *In re Kemmler*, 136 U. S. 436. An examination of both these classes of cases under the fourteenth amendment, says Mr. Justice Brown, will demonstrate that, in passing upon the validity of State legislation under that amendment, the supreme court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that, in some of the States, methods of procedure which, at the time the constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests, while, upon the other hand, certain other classes of persons (particularly those engaged in dangerous or unhealthful employments) have been found to be in need of additional protection. As to such cases, which involve in large measure the question here before the court, Mr. Justice Brown after stating the doctrine that a general prohibition against entering into contracts with respect to property would be invalid, says that this right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. The following cases upon the subject are cited and reviewed: *Allgeyer v. Louisiana*, 165 U. S. 578; *Lawton v. Steele*, 152 U. S. 133; *Massachusetts v. Alger*, 7 Cush. 84; *Douglas v. Kentucky*, 168 U. S. 488; *Daniels v. Hilgard*, 77 Ill. 640; *Coal Co. v. Taylor*, 81 Ill. 590; *Com. v. Hamilton Mfg. Co.*, 120 Mass. 383. "We have no disposition," concludes Mr. Justice Brown, "to criticise the many authorities which hold that State statutes restricting the

hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class. The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinions in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357, and *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. Rep. 730, with those later expressed in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064."

#### NOTES OF IMPORTANT DECISIONS.

COMBINATIONS—IN RESTRAINT OF TRADE—ANTI-TRUST LAW—INTERSTATE COMMERCE.—In three recent cases has arisen the question as to the validity of combinations or trusts in restraint of trade. In *United States v. Coal Dealers' Association of California*, 85 Fed. Rep. 252, decided by the United States Circuit Court, Northern District California, it was held that under the anti-trust law of July 2, 1890, a contract or combination which imposes any restraints whatever upon interstate commerce is unlawful; and that it is immaterial whether or not the restraint is a fair and reasonable one, or whether it has actually resulted in increasing the price of the commodity dealt in. It was further specifically held that where coal is brought from other States and foreign countries to a certain city by importers and dealers, who, by a combination with a local coal dealers' association, regulate the retail prices arbitrarily, and provide against free competition, such combination is one in restraint of interstate commerce, within the meaning of the Act of 1890.

In *United States v. Addyston Pipe and Steel Co.*, 85 Fed. Rep. 271, decided by the United States Circuit Court of Appeals, it was held that no contractual restraint of trade is enforceable at common law unless the covenant embodying it is merely ancillary to some lawful contract (involving some such relations as vendor and vendee, partnership, employer and employee), and necessary to protect the covenantee in the enjoyment

of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard for determining the reasonableness and validity of the restraints. But where the sole object of both parties in making the contract is merely to restrain competition, and enhance and maintain prices, the contract is void.

It appeared that a number of companies manufacturing iron pipe in different States formed a combination whereby the territory in which they operated (comprising a large part of the United States) was divided into "reserved" cities and "pay" territory. The reserved cities were allotted to particular members of the combination, free of competition from the others, though provision was made for pretended bids by the latter at prices previously arranged. In the pay territory all offers to purchase pipe were submitted to a committee, which determined the price, and then awarded the contract to that member of the combination which agreed to pay the largest "bonus" to be divided among the others. It was held that this was an unlawful combination, both at common law and under the Act of 1890, against trusts and monopolies.

In *Trenton Potteries Co. v. Oliphant*, 39 Atl. Rep. 923, decided by the Court of Chancery of New Jersey, the following is from the official syllabus:

"Contracts in general restraint of trade—that is, restraining a man from pursuing his business anywhere in the United States—are void as against public policy.

"Contracts in partial restraint of trade—that is, those which restrain from pursuing a business within a defined area less than the whole country—will be enforced if the space of exclusion is no wider than is reasonably required for the protection of the covenantee in the enjoyment of the business to which the covenant relates, and not so large as to interfere with the interests of the public.

"In ascertaining whether the exclusion is wider than is required for the protection of the covenantee, and therefore uselessly in restraint of trade, each case will be considered and determined on the facts attendant upon the particular transaction.

"The intention of the purchaser and covenantee to produce from a plant one of several classes of goods for which it was used, does not make a covenant unreasonable which restrains the vendor from competition in the manufacture of all the classes of articles which the plant could produce.

"It is not the intention with which the covenantee bought, but the relation of the covenant to the thing sold, which furnishes the guide by which to ascertain the reasonableness of the restraint imposed by the covenant.

"Where the covenant as expressed is made partial in its area of restraint, only by the naming of exceptions which are colorable and pretentious,

so that the covenant in fact restrains the covenantor from pursuing his business anywhere in the whole country, it is in general restraint of trade, and void, as against public policy.

"Where the area within which the vendor and covenantor is excluded from competition covers whole groups of States over which the business sold did not extend, the covenant is wider than is necessary for the protection of the covenantee in the enjoyment of the thing sold, and is void as against public policy.

"If the covenant is expressed by the parties to exclude from the competition in several separate and distinct places, as to some of which the exclusion is reasonable, while as to others it is not, the court will consider the covenant to be divisible, and will enforce it within the reasonable area; but the court will not select from a contiguous area, which is in itself unreasonable, such a portion as would, had it been distinctly named by the parties, have been deemed to be a reasonable extent of exclusion, and thus force the divisibility of the covenant, and compel its performance in the selected space.

"It is the business as it existed at the time of sale that the vendors convey, and in respect to which they covenanted not to compete, and the reasonableness of the covenant restraining the vendors from competition will be tested by the relation of the extent of territory over which the business was done when it was sold to the area from which they are by the covenant excluded. If they are not shut out from any more space than is necessary to enable the purchaser and covenantee to enjoy the thing sold, the covenant is reasonable, and will be enforced; if they are so excluded, the covenant is injurious to the public, and will not be enforced.

"The expansion of the business, by purchases of like concerns by the covenantees from other parties, by increased capital, and by combinations and control of production and sales, will not be considered to justify the too great breadth of the covenant when it was made.

"Where the members of a manufacturers' association produce nearly the whole quantity of an article necessary to the comfort and health of the community, and have agreed to make their prices such as the majority of the members shall prescribe, a scheme to buy and combine into one company the plants of a majority of the members, obtain the control of prices at which all the members shall sell, put the vendors under a covenant not to compete, and thus secure the ability to dictate the prices which the public must pay for the productions of all the members of the association, is an effort to create a monopoly in an article of general necessity, and is against public policy.

"The covenants to restrain competition, though they may be several as between the vendors and the vendee, will be considered as part of a single plan to secure a monopoly. If they are executory, a court of equity will not enforce them."

**BILLS AND NOTES—BONA FIDE HOLDER—MATURITY—DAYS OF GRACE.**—One of the points involved in the case of *Hang v. Riley*, decided by the Supreme Court of Georgia, is of special value in the practice pertaining to commercial law. It appeared there that a promissory note was negotiated to a third party on the second of the three days of grace allowed by law on such instrument. The question was whether the holder is to be regarded as having taken the note before maturity. The court very properly held that the note does not become due until the last day of grace, and one to whom it is transferred on the second day of grace takes it before maturity, and will be presumed to have been a *bona fide* purchaser for value. This ruling is in accordance with the authorities on the subject, but as to whether one who takes a note on the third or last day will be protected as a *bona fide* holder, there is a conflict of authority. Parsons in his work on Notes and Bills considers the correct rule to be, that a note is negotiable, even on the last day of grace. 1 Parsons, Notes & Bills, p. 416. Such is the view entertained by Mr. Daniel also. 1 Daniel, Nego. Inst. § 787a. See also Randolph on Commercial Paper, § 1037. This rule obtains in New York, Illinois, New Hampshire, Maine, and Iowa. See *Bank v. Townsend*, 87 N. Y. 8; *Walter v. Kirk*, 14 Ill. 55; *Crosby v. Grant*, 36 N. H. 273; *Farrell v. Lovett*, 68 Me. 330; *Bosch v. Kassing*, 64 Iowa, 312, 20 N. W. Rep. 454. A contrary rule is of force in Massachusetts. *Pine v. Smith*, 11 Gray, 38. That case does not, however, go further than to rule that a transfer on the last day of grace is not to be considered as before maturity, it being conceded that a transfer on the first or second day of grace would clearly be before dishonor. In *Fox v. Bank*, 30 Kan. 441, 1 Pac. Rep. 789, it was held that a negotiable bill or note indorsed and transferred on the first day of grace was negotiated before maturity. And see *Bank v. Bates*, 8 Conn. 505, in which it appeared that the transfer was made on the second day of grace. In the latter case, Bissell, J., said (page 511), in delivering the opinion of the court: "It is too well settled to admit of dispute that, in regard to negotiable notes, the days of grace make a part of the original notes; the days of grace make a part of the original contract. Such a note, payable by the terms of it in 60 days, is in law a note payable in 63 days. Before the expiration of that time, no demand of payment can be made; and, if negotiated on the sixty-first or sixty-second day, it is not negotiated overdue." Thus, it will be seen that, while there is not unanimity of opinion upon the question whether or not a bill or note on which grace is allowable negotiated on the last day of grace is taken subject to existing equities, etc., the entire current of authority is to the effect that the time for payment expressed on the face of such an instrument is not to be regarded as fixing the day upon which the same will become due, but that days of grace are to be computed in determining the date of its maturity.

**VENDOR AND PURCHASER — ASSUMPTION OF MORTGAGE — UNDISCLOSED PRINCIPAL.**—It was held by the Supreme Court of Texas, in *Sanger v. Warren*, that the undisclosed principal of one who as agent takes a deed to himself for land in which he becomes liable for a mortgage thereon, without disclosing his agency, cannot be held for the mortgage debt upon being discovered, under the rule that on discovery of an undisclosed principal recovery may be had against him, since such rule did not apply at common law to instruments required to be under seal, and the force and effect of deeds under the common law was not changed by Rev. St. 1895, art. 4863, providing that no seal shall be necessary to the validity of any instrument in writing, and that the addition or omission of a seal shall not affect the same. The following is from the opinion of the court: "It has long been settled to be a general rule of law that if A contracts with B supposing him to be acting in his own behalf, but afterwards discovers that he was acting for C, A can thereupon elect to hold C upon the contract. The rule is held applicable to written contracts, and, by a process of reasoning not entirely satisfactory, even to those required by statute to be in writing. In the leading case of *Higgins v. Senior* (1841), 8 Mees. & W. 844, Parke, B., said: 'The question in this case, which was argued before us in the course of the last term, may be stated to be whether, in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of *non-assumpsit*, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration, we think it was not, and that the rule for a new trial must be discharged. There is no doubt that, where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done.' *Beckham v. Drake*, 9 Mees. & W. 79; *Cattle Co. v. Carroll*, 63 Tex. 48; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. Rep. 165.

"The exceptions to the rule, however, are so numerous, broad, and well defined, and rest upon principles of such a fundamental character, that the careful student of the law is driven to the conclusion that they are more important than the rule itself, and that the statement of the rule in such broad language has produced much confusion of thought, and greatly embarrassed, and probably has often misled, the courts in their efforts to apply correct legal principles to particular cases. It is well settled that the rule never had any application to negotiable instruments, no one being chargeable thereon, 'unless his name appears as a party to the paper in some relation' (authorities above cited). Again, it has been said that 'this broad doctrine, that, when an agent makes a contract in his own name only, the known or unknown principal may sue or be sued thereon, may be applied in many cases with safety, and especially in cases of informal commercial contracts. But it is certain that it cannot be applied where exclusive credit is given to the agent, and it is intended by both parties that no resort shall be had by or against the principal (Story, Ag. § 160a); nor does it apply to those cases where skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it. Fry, Spec. Perf. § 149.' Kelley v. Thuey, 102 Mo. 529, 15 S. W. Rep. 62. And the court refused to allow, the undisclosed principal to enforce specific performance of a contract to convey land on the ground that, the owner having contracted for the notes of the agent for deferred purchase money, he could not be compelled to accept those of the principal. Again, it is well settled that the rule never had any application to sealed instruments, especially those which at common law must have been under seal, such as conveyances of land. Briggs v. Patridge, 64 N. Y. 357; Tuthill v. Wilson, 90 N. Y. 423; Walters v. Coal Co., 5 De Gex, M. & G. 629; Borchertling v. Katz, 37 N. J. Eq. 150; Farrer v. Lee (Sup.), 41 N. Y. Supp. 672; Evans v. Wells, 22 Wend. 335; Jones v. Morris, 61 Ala. 518.

"According to the weight of authority, if the deed from Bowser and others to Rees had been sealed and delivered by the grantors to Rees, at common law, his acceptance thereof would have made it his deed to the same extent that it would have been if signed and sealed by him also, and that as to him it would have been a sealed instrument. Therefore an action of covenant could have been maintained against him, but not against his principals. Sanger and others, on the contract of assumption therein contained. Finley v. Simpson, 22 N. J. Law, 311, and authorities cited in briefs therein; Golden v. Knapp, 41 N. J. Law, 215; Sparkman v. Gove, 44 N. J. Law, 263; Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 94 N. Y. 86; Maynard v. Moore, 76 N. Car. 166; Smith v. Pocklington, 1 Crompt. & J. 445; Vanmeter v. Vanmeter, 3 Grat. 148, and authorities *supra*. There are cases holding that it would not at common law have been considered Rees' deed, and that

covenant could not have been maintained thereon against him. Maule v. Weaver, 7 Pa. St. 329; Johnson v. Muzzy, 45 Vt. 419; Trustees v. Spencer, 7 Ohio, pt. 2, p. 149; Goodwin v. Gilbert, 9 Mass. 510; Martin v. Drinan, 128 Mass. 515; Hinsdale v. Humphrey, 15 Conn. 431. Therefore, at common law, the general rule above stated would have had no application to the conveyance to Rees, and his undisclosed principals would not have been liable. We are of opinion that the result is not affected by the following statute: 'No private seal or scroll shall be necessary to the validity of any contract, bond or conveyance, whether respecting real or personal property, or any other instrument of writing, whether official, judicial or private, except such as are made by corporations, nor shall the addition or omission of seal or scroll in any way affect the force and effect of the same.' Rev. St. 1895, art. 4862. It is true the statute renders it unnecessary to place a seal upon a deed, but it does not undertake to give one executed without a seal a different status from what it would have had before if executed with a seal. On the contrary, it provides that the addition or omission of a seal shall not 'in any way affect the force and effect of the same.' In order for the omission of the seal not to in any way affect its force or effect, the deed must be allowed to retain the only status it had before. When we adopted the common law, its settled rules relating to the construction and effect of deeds became a part of our system. To them we were compelled to resort to determine the nature and extent of the estate conveyed by the deeds, as well as the covenants therein contained, and who were bound or benefited thereby. It was not the intention of said statute to abolish them. As said in Jones v. Morris, 61 Ala. 524, in discussing a more comprehensive statute than ours: 'Though a seal may not now be necessary to a conveyance of a legal estate in lands, yet the instrument, the deed of conveyance, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and, whatever they may be, are as obligatory and its recitals are as incapable of being gainsaid, as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law, is now claimed by the appellee shall be attached to the conveyance by the agents of the appellant. And we cannot doubt that the estoppel which, at common law, grew out of the covenants, or the recitals of the sealed instrument, attach now to an unsealed conveyance of the legal estate in lands. The statute is not so broad in its sweep as to blot out the common law principles which give security to conveyances of real estate. It would be fearful, indeed, if this was the operation of the statute and the freehold in lands was not invested with greater dignity than the fleeting ownership of chattels.' Devlin on Deeds (section 249) says: 'The effect of these statutes is simply to dispense

with the necessity of affixing a seal to a deed; but in other respects, as for instance with reference to the doctrine of estoppel, the deed retains the incidents it possessed as a sealed instrument at common law.<sup>7</sup> The effect of the statute is different as to other contracts, for the placing of the seal thereon at common law raised them from parol to specialty contracts, which cannot be done under the statute."

#### RECENT PHASES OF CONTRACT LAW— IV. PERFORMANCE TO THE SATISFACTION OF THE PROMISOR.

*The Question Discussed.*—What is the legal effect of an agreement that goods to be delivered or service to be rendered shall be "satisfactory" to the purchaser or recipient? It would certainly seem that if such an agreement means anything, it means that the latter reserves to himself the right of decision as to what is satisfactory, and that his conclusion shall be final and undisturbed.

The cases of this character may conveniently be put under two heads: 1st. Where the fancy, taste, sensibility or judgment of the promisor are involved. 2d. Where the question is merely one of operative fitness or mechanical utility.

*The First Class of Cases.*—1. The personal thread which runs through agreements of this kind has had such weight in all the courts that there appears to be a unanimity of judicial opinion that here, at least, the promisee is practically debarred from questioning the ground of decision on the part of the promisor or investigating its propriety. The courts refuse to say that where a man agrees to pay if he is satisfied with a thing of this kind he should be compelled to pay on proof that some one else is satisfied with it. They recognize that in matters of taste and opinion there is no absolute standard as to what is good or bad, and leave each man free to act on his ideas or prejudices as the case may be. Hence we find that where the subject-matter of the contract is a suit of clothes,<sup>1</sup> a bust of the defendant's husband,<sup>2</sup> a portrait of the defend-

ant's daughter,<sup>3</sup> a cabinet organ,<sup>4</sup> a set of artificial teeth,<sup>5</sup> a carriage<sup>6</sup>, a steam heater for a house,<sup>7</sup> a play to be written by an author for an actor,<sup>8</sup> a design for a bank note,<sup>9</sup> the question is not one for court or jury to decide, but for the promisor alone. So where the contract gives the master a right to discharge a servant if he is satisfied that the servant is incompetent,<sup>10</sup> or to employ him so long as he is satisfactory,<sup>11</sup> or to pay for services if they

titled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with. Nor is it sufficient to say that the bust was the best thing of the kind that could possibly be produced. A contract to produce a bust, perfect in every respect, and one with which the defendant ought to be satisfied is one thing; an undertaking to make one with which she will be satisfied is quite another. The former can only be determined by experts; the latter can only be determined by the defendant herself."

<sup>3</sup> *Jotson v. Cranage*, 39 Mich. 49, 38 Am. Rep. 351. "Artists or third parties might consider a portrait an excellent one, and yet it prove very unsatisfactory to the person who had ordered it and who might be unable to point out with clearness or certainty the defects or objections." And see *Hoffman v. Gallaher*, 6 Daly, 42; *Moore v. Goodwin*, 43 Hun, 533.

<sup>4</sup> *McClure v. Briggs* (Vt.), 2 Atl. Rep. 583. "The defendant did not take the organ to see whether it answered the contract or not, for if he had, and it did, he is bound to keep and pay for it, whether satisfied or not; but he took it to see whether it was satisfactory to him or not. Neither he nor any of his family were competent to judge as to the quality of the organ, and so he called in an expert to test it, and he told him the tone of it was good, and better than that of the Estey organ, which he seemed to like; but notwithstanding the opinion of the expert, he was so under the spell of the Estey organ, however, that he still thought he was dissatisfied with the tone of the organ, and if he really thought so, he was so, 'for as a man thinketh in his heart, so is he.'"

<sup>5</sup> *Hartman v. Blackburn*, 7 Pitts. L. J. 140.

<sup>6</sup> *Andrews v. Belfield*, 2 C. B. (N. S.) 779.

<sup>7</sup> *Adams Radiator Co. v. Schrader* (Pa.), 26 Atl. Rep. 745.

<sup>8</sup> *Haven v. Russell*, 34 N. Y. (Supp.) 292; *Glenny v. Laey*, 1 N. Y. (Supp.) 513.

<sup>9</sup> *Gray v. Alabama Nat. Bk.*, 10 N. Y. (Supp.) 5, 14 *Id.* 155.

<sup>10</sup> *Cassidy v. Janaschek*, 54 Am. Rep. 714. "This clause made the defendant the sole judge of the competency."

<sup>11</sup> *Spring v. Ansonia Clock Co.*, 24 Hun, 175; *Tyler v. Ames*, 6 Lans. 280. "If he is required to prove facts and circumstances which would justify him in feeling dissatisfied with the manner plaintiff filled his office, it would be annulling this clause of the contract, as without such a clause he would have the right to dismiss the plaintiff, if he did not properly perform his duties." *Rossiter v. Cooper*, 23 Vt. 520; *Bush v. Koll* (Colo.), 29 Pac. Rep. 919; *Frary v. Am. Rubber Co.* (Minn.), 53 N. W. Rep. 115; *Koehler v. Buhl* (Mich.), 54 N. W. Rep. 157. "It is settled law that where a person contracts to work to the satisfaction of his employer, the employer is the judge, and the question of the reasonableness of his judgment is not a question

<sup>1</sup> *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

<sup>2</sup> *Zaleski v. Clark*, 44 Conn. 218. "The plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable; she, and not the court, is en-

are satisfactory.<sup>12</sup> The same conclusion was reached in a case where a son agreed to support his father during his life, but if at any time the latter should become dissatisfied with living with him, the son would pay his board elsewhere.<sup>13</sup>

*The Second Class of Cases.*—2. But is there any good reason why in cases of the second class the same principle of law should not be applied. Though the thing to be done may not involve the feelings, the taste, or the sensibility or the personal opinion of the promisor, yet he, in making the contract, may not have been willing to leave his freedom of choice exposed to any contention or subject to any contingency. "He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable." Now, as there is assuredly no law which prevents a person from making contracts of this kind if he chooses, why should the courts hesitate to enforce them? The agreement is in short not to make or do a thing which the promisor ought to be satisfied with, and, therefore, ought to pay for, but to make or do a thing which he is satisfied with. Such a contract may be one-sided in being dependent upon the caprice of one of the parties; it may be an unwise contract to make, but if it is entered into voluntarily, the promisee is bound, and can have no right to ask a court to alter its terms in his favor. This view of the matter is surely the only logical one, and has been taken in a number of cases, *e. g.*, where the subject-matter of the agreement was the making of a book case,<sup>14</sup>

for the jury." *Harder v. Commrs.*, 97 Ind. 455; *Allen v. Mutual Compress Co. (Ala.)*, 14 South. Rep. 362.

<sup>12</sup> *Johnson v. Bindseal*, 8 N. Y. Supp. 485.

<sup>13</sup> *Hart v. Hart*, 22 Barb. 606. "It is a case where the law will not undertake to say for the party he must be satisfied and has no right to be dissatisfied with living in this family; for the party by the express terms of his contract has made his own feelings the sole judge of the matter. Contentment and satisfaction with a man's position in a particular family is a matter which the law will not assume to determine for him, neither will it do the converse, and say he had no cause to be discontented and dissatisfied, and therefore he cannot be regarded as dissatisfied. The agreeableness or disagreeableness of the society and state of things about him in the family are left to his own tastes and feelings to determine."

<sup>14</sup> *McEarren v. McNulty*, 7 Gray, 141. "It may be that

the sale of a harvesting machine,<sup>15</sup> the sale of a steam fire engine,<sup>16</sup> of a cord binder,<sup>17</sup> a steamboat,<sup>18</sup> an elevator,<sup>19</sup> steam fans for ex-

the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain, the law can afford him no relief. Having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be ascertained and determined solely by its provisions."

<sup>15</sup> *Wood Reaping Co. v. Smith*, 50 Mich. 565, 45 A. N. 57. "The plaintiff's own evidence is cogent that the defendant was extremely shy, and would enter into no arrangement, except upon the terms of doing as he liked about keeping the machine after testing it. His mind was fixed immovably that no chance should be left to force the article upon him unless he finally chose to take it, and the special stipulation was specifically drawn and executed to meet this purpose, and thereby induce the defendant to concur in the arrangement. Had it been the intention that he should be liable in case the performance of the machine were such, in the opinion of a jury, as to deserve his approval, it would have been quite unnecessary to get up the special writing. And see *Platt v. Broderick (Mich.)*, 38 N. W. Rep. 579; *Osborne v. Francis (W. Va.)*, 18 S. E. Rep. 591, the court saying: "In such cases it is generally for the buyer to decide for himself whether a refusal to accept is or is not reasonable, because he uses for that purpose a term which indicates the state of his own feelings which it is hard for any one to know so well as himself, and he may have prescribed the term for the purpose of protecting the gratification of some whim or fancy of his own, at all events to protect himself from the necessity of rendering any reason for his conduct."

<sup>16</sup> *Silsby Manfg. Co. v. Chico*, 24 Fed. Rep. 593. "The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser, it must be satisfactory to him or he is not required to take it. It is not enough that he ought to be satisfied with the article; he must be satisfied or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge, and if he deliberately enters such an agreement he must abide by it."

<sup>17</sup> *McCormick Harvesting Co. v. Chesrown*, 33 Minn. 32.

<sup>18</sup> *Gray v. R. Co.*, 11 Hun. 70. "By the clause the agreement left it entirely for the defendants to determine whether or not they were satisfied. There is no reason in law why parties may not, if they think proper, make agreements of this kind, and in all cases where such agreements have been made the determination of the party that he is not satisfied, and his refusal to accept and pay for the property, is conclusive and terminates the contract."

<sup>19</sup> *Singerly v. Thayer*, 108 Pa. St. 297. "He does not agree to accept what might be satisfactory to others, but what was satisfactory to himself. This was a fact which the contract gave him the right to decide. He was the person negotiating for its purchase. He was the person who was to test it and use it. No other person could intelligently determine whether in every respect he was satisfied therewith."

hausting smoke,<sup>20</sup> a printing press,<sup>21</sup> a grain binder,<sup>22</sup> a machine for generating gas,<sup>23</sup> a fanning mill.<sup>24</sup>

The sole right to determine has been held to be vested in the promisor where he has agreed to pay such compensation as he should deem or think right;<sup>25</sup> where he has agreed that if at any time the character of an employee's work, on the increase of business secured by him, should "fairly justify a change of mind on the part of the conductors of the paper," his salary should be increased.<sup>26</sup>

Cases involving the same principle, but arising under other circumstances than upon a sale are *Nelson v. Von Bonnhorst*,<sup>27</sup> where a debtor agreed to pay a sum of money "whenever in my opinion my circumstances will enable me to do so;" and it was held that the instrument imposed no legal obligation which could be enforced by action as the maker was the sole judge of his ability. "Every other person might swear the circum-

<sup>20</sup> Exhaust Ventilating Co. v. R. Co., 66 Wis. 218.

<sup>21</sup> Campbell Printing Press Co. v. Thorp, 36 Fed. Rep. 414.

<sup>22</sup> Plano Manfg. Co. v. Ellis (Mich.), 35 N. W. Rep. 841. "Why should it be said when the bargainer has reserved the right to elect whether he be fully pleased or not, that he is bound to be pleased, if another reasonable or intelligent man is pleased with the work of such machine." Seeley v. Welles (Pa.), 13 Atl. Rep. 736.

<sup>23</sup> Aiken v. Hyde, 99 Mass. 183.

<sup>24</sup> Goodrich v. Van Nortwick, 43 Ill. 445. "If it did not suit appellee then he had the right to return the property, and he was by the terms of the contract to be sole judge of whether it suited him. That did not depend upon the opinion or judgment of other persons."

<sup>25</sup> Taylor v. Brewer, 1 M. & S. 290, the court saying, that the meaning of "the resolution being that it was in the breast of the committee whether the plaintiff was to have anything or not." Butler v. Mill Co., 28 Minn. 205, 9 N. W. Rep. 697, the court saying. "The stipulation that the amount of the compensation should depend upon the judgment and decision of the employer may have been an undesirable one for the plaintiff to consent to, but he nevertheless chose to accept the employment on those terms. The contract was an entirety, and of obligation in all its parts, and the law cannot, after it has been executed, relieve the plaintiff from the consequences of one of its stipulations, which proves to be disadvantageous to him. That would, in effect, be making a new contract for the parties." And see *Tolmie v. Dean*, 1 Wash. 57.

<sup>26</sup> Blaine v. Knapp (Mo.), 41 S. W. Rep. 787. "Whether plaintiff should receive the increase in salary claimed by him was a matter of contract, dependent upon certain conditions thereafter to take place, with full power vested in defendant to pass upon those questions, which the petition shows were determined by defendant adversely to plaintiff's claim to the increase."

<sup>27</sup> 29 Pa. St. 352.

stances of the debtor make him abundantly able to pay, yet that did not determine his legal liability," and a number of decisions where the provision in a chattel mortgage that the mortgagee may take possession of the chattels whenever he deems himself "insecure" or "unsafe," is held to give him an absolute discretion which does not depend upon whether or not there existed reasonable grounds for his action.<sup>28</sup>

"Satisfactory" means satisfactory to the promisor,<sup>29</sup> if the contract is silent as to the person to whom it shall be satisfactory. This is surely the only sensible construction of such words. As well put by Mr. Justice Brown, now of the Supreme Court of the United States, then on the bench of the Federal District Court of Michigan: "When in common language we speak of making a thing satisfactory we mean it shall be satisfactory to the person to whom we furnish it. It would be nonsense to say that it should be satisfactory to the vendor. It would be indefinite to say that it should be satisfactory to a third person, without designating the person. It can only be intended that it shall be satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee."<sup>30</sup> Otherwise the condition has no meaning at all. If goods ordered for a particular purpose are not reasonably fit for the purpose, of which as a question of fact the jury is the judge, then the contract has not been performed on the plaintiff's part and the defendant is not obliged to accept, even had there been no such clause or condition in the contract.<sup>31</sup> So the right of a master to discharge a servant arises in all cases where the servant's work is not what the law considers satisfactory.<sup>32</sup>

*Limitations to the Rule.*—The promisee must act honestly and in good faith; his dissatisfaction must be actual not feigned; real

<sup>28</sup> Allen v. Vose, 34 Hun, 57, 51 Am. Rep. 805; Cline v. Libbey, 46 Wis. 123, 32 Am. St. Rep. 700; Barret v. Hart, 42 Ohio St. 41, 51 Am. Rep. 801; Werner v. Bergman, 28 Kan. 60, 42 Am. Rep. 152. This view is however opposed in Illinois: *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151.

<sup>29</sup> McCormick Harvesting Co. v. Chesrown, 33 Minn. 32; Singerly v. Thayer, 108 Pa. St. 297.

<sup>30</sup> Campbell Printing Press Co. v. Thorp, 36 Fed. Rep. 414.

<sup>31</sup> Hart v. Hart, 22 Barb. 610; Wood Reaping Co. v. Smith, 50 Mich. 565, 40 A. R. 57.

<sup>32</sup> Lawson, Rights, Rem. & Pr. § 271.

not merely pretended.<sup>33</sup> If the purchaser is in fact satisfied but fraudulently and in bad faith declares that he is not the condition is performed;<sup>34</sup> for the purpose, for example, of evading payment of the price, a dishonest declaration of dissatisfaction would be nugatory.<sup>35</sup> He must, if a test is necessary to determine its fitness, give that test or allow it to be made.<sup>36</sup> If an employer, for example, agrees to pay for services if they are satisfactory to him, he will certainly be under an obligation to give the employee a trial. So if a man should order a suit of clothes and agree to pay for them if they suited him, he would certainly be obliged to try it on.<sup>37</sup> So an article to be manufactured could not be rejected before it was substantially-completed, so that the promisor will be able fairly to determine whether it was or would be satisfactory to him.<sup>38</sup> But having decided that it is not satisfactory, the buyer is not obliged to give the seller an opportunity of making it so.<sup>39</sup>

*The Condition a Suspensory One.*—In the case of a sale of goods to be accepted or paid for, if "satisfactory," the condition is a suspensory one,<sup>40</sup> i. e., it suspends the obligations of both parties until the purchaser's satisfaction is gained or waived.<sup>41</sup> Hence that the goods are not satisfactory does not give him a right to reject them and to claim damages for the breach of contract of the seller,<sup>42</sup> nor to keep them and recover damages in an action for the purchase price.<sup>43</sup> The

non-fulfillment of a condition of this kind is in short available only as a defense to the person in whose favor it is made, and does not subject the other to any liability. A suspensory condition is to be distinguished from a promissory condition. In the latter case, while it is a condition precedent to the liability of one party, the other is nevertheless under an obligation to perform it, or he will be liable in damages.<sup>44</sup> In a Maine case<sup>45</sup> the defendant agreed to take and pay for certain machines to be made according to a model to be furnished by him. The plaintiff agreed to have them finished and ready for delivery by a certain day. The defendant never furnished a model, whereupon the plaintiff purchased a model, made the machines, and then sued the defendant for the purchase price. The plaintiff was held not entitled to recover. But the plaintiff, on the defendant's refusal to supply the models, would have had a right of action for damages, for the defendant had promised, in law, to supply the models. The case may be stated thus: A agrees to pay for a machine to be made by B, and agrees to furnish a model by which B is to build it. B is not obliged to make the machine unless A furnishes the model, but if A does not do so he breaks one of his promises, and may be sued for the breach by B. If A does furnish the model B must make the machine or pay damages. The case of the suspensory condi-

414, where Brown, J., says: "This undoubtedly gave them the right to reject the machines. Had the covenant been that the presses shall work well, we should have no doubt that the defendants might have recouped such damages, and that the referee would have found them capable of estimation. These damages would have been the difference in value between presses which would work reasonably well and those which were actually furnished. But in attempting to apply the same rule in the present case we encounter a formidable difficulty from the impossibility of fixing the value of machines which shall work to the satisfaction of the defendants. It will not do to say that such value is to be gauged by that of a machine which shall work reasonably well, because such a press might not have been satisfactory to the vendee, or he might have been content with one which would not have worked to the satisfaction of experts in the business." The court overlooked the real state of the case, as shown above, viz.: that the condition was merely suspensory, and until it was performed or waived, there was no sale. The difficulty of assessing the damages has nothing to do with the result, the reason preventing the claim for damages being that having elected to retain the machines, they waived the performance of the condition and became liable for the purchase price.

<sup>44</sup> See Hunt v. Livermore, 5 Pick. 305.

<sup>45</sup> Savage Manfg. Co. v. Armstrong, 19 Me. 147.

<sup>33</sup> Daggett v. Johnson, 49 Vt. 345; Singerly v. Thayer, 108 Pa. St. 297; Hartford Manfg. Co. v. Brush, 43 Vt. 528.

<sup>34</sup> Silsby Manfg. Co. v. Chico, 24 Fed. Rep. 893.

<sup>35</sup> Adams Radiator Co. v. Schnader, 26 Atl. Rep. 744.

<sup>36</sup> Balt. etc. R. Co. v. Brydon, 65 Md. 198, 57 Am. Rep. 318; Exhaust Ventilator Co. v. R. Co., 66 Wis. 218; Manning v. Glendenning, 15 Wis. 50; Mackay v. Dick, 6 App. Cas. 251; Van Hook v. Burns (Wash.), 38 Pac. Rep. 763; Crane Elevator Co. v. Clark, 80 Fed. Rep. 705; Adams Radiator Co. v. Schnader (Pa.), 26 Atl. Rep. 745, holding that where the promisor dies before the test is made, the right to reject vests in his executor.

<sup>37</sup> Daggett v. Johnson, 49 Vt. 345.

<sup>38</sup> Singerly v. Thayer, 108 Pa. St. 297.

<sup>39</sup> Aiken v. Hyde, 99 Mass. 183; Brown v. Foster, *supra*.

<sup>40</sup> See Laws. Contr., § 452.

<sup>41</sup> Exhausting Co. v. R. Co., 66 Wis. 218; Phelps v. Willard, 16 Pick. 29.

<sup>42</sup> As would be the case if there was a warranty that the goods were fit for the purpose and they were not. Shupe v. Collender (Conn.), 15 Atl. Rep. 405.

<sup>43</sup> Campbell Printing Press Co. v. Thorp, 36 Fed. Rep.

tion may be stated thus: A agrees to make B a "satisfactory" coat. If A makes the coat B is not obliged to perform his promise (i. e., pay for it) unless it is satisfactory to him. B cannot keep the coat and sue A because it is not satisfactory, nor can B reject it and sue A for not making him a satisfactory coat, nor, it would seem, if A fails to make a coat at all can B sue A; for in such a case there is no mutuality, B not being bound to anything. Nothing can be more contradictory to the idea of contractual obligation, than a liability on the part of one of the promisors to perform or not as he pleases.<sup>46</sup>

The condition is waived by retaining the article or by failing within a reasonable time to notify the seller that it is not satisfactory.<sup>47</sup> But if the seller is so notified, the buyer is not required, in the absence of a special agreement, to return it.<sup>48</sup>

*Cases Apparently Discordant.*—There are a few cases that are sometimes referred to as being opposed to the rule as laid down in the decisions just cited, which on closer examination will be found to rest on the difference between an executory contract of sale, and work and labor which have been done on the house or land of the promisor. The fact that the contractor will lose the fruit of his labor and the value of his material through no fault of his, if payment is left to the will of the defendant, has induced some courts to give a construction to the contract which would probably not have been given, in the case of an executory sale, where the seller would simply have been left with the rejected goods on his hands. Thus, in *Hawkins v. Graham*,<sup>49</sup> where the agreement was to furnish and set up in complete and first-class working order a system of heating apparatus, "the payment to be made in the event of the system proving satisfactory, and conforming with all the requirements, after such acknowledgment has been made by the owner, or the work demonstrated," it was held that the construction of the italicized words, in connection with the word "satisfactory," was that if the work was demonstrated it was satisfactory, although

the owner had not acknowledged it, and that therefore "the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measure set forth in the contract; not by the private taste or liking of the defendant." In *Doll v. Noble*<sup>51</sup> the action was to recover a balance due on a written contract under which the plaintiff agreed to do polishing, staining and rubbing on the woodwork of two houses owned by the defendant "in the best workman-like manner under the supervision of W P, superintendent, and to the entire satisfaction of W N, the owner," it was ruled that the clause as to the owner's satisfaction was qualified by the provision that it was to be done in a workman-like manner, and that the latter was thereby made the test of a correct and full performance. In *Clark v. Rice*,<sup>52</sup> the agreement was to pay for a patent heater "if on trial the machine is satisfactory or does what is claimed for it." It was properly held that the purchaser was bound to pay for the machine if it did what was claimed it would do, even though it was not satisfactory to him. In *McNeil v. Armstrong*,<sup>53</sup> a building contract provided that the work was to be done according to certain plans and specifications, materials furnished to be of the best, and to be to the entire satisfaction of the architect and owner. It was ruled that if it appeared that the materials furnished were satisfactory, and the work was done according to the plans and specifications, the contractor was entitled to recover. The court said that as the contract was drawn up by the defendant, the well-settled rule was applicable, that in case of doubt or ambiguity the words are to be taken most strongly against the party employing them, and such construction adopted as is most favorable to the other party. In *Electric Lighting Co. v. Elder*,<sup>54</sup> a contract by plaintiffs to sink for defendant an artesian well provided that the well should have a certain flow, and that materials and workmanship should be first-class; that the water should be deep-strata water, as water from intermediate strata "is likely to be of such quality as not to be adapted to the use"

<sup>46</sup> Laws. Contr., § 97; *Hunt v. Livermore*, 5 Pick. 396. See *Michigan Stove Co. v. Harris*, 81 Fed. Rep. 928.

<sup>47</sup> *Campbell Press Co. v. Thorp*, 36 Fed. Rep. 414.

<sup>48</sup> *Latham v. Bausman* (Mich.), 38 N. W. Rep. 776.

<sup>49</sup> *Exhaust Co. v. R. Co. (Wis.)*, 34 N. W. Rep. 509.

<sup>50</sup> 149 Mass. 284, 14 Am. St. Rep. 422.

<sup>51</sup> 116 N. Y. 230, 15 Am. St. Rep. 398. And see *Russell v. Allerton*, 108 N. Y. 292.

<sup>52</sup> (Mich.) 9 N. W. Rep. 427.

<sup>53</sup> 81 Fed. Rep. 943.

<sup>54</sup> 21 South. Rep. 983 (Ala., 1897).

of defendant; that payment should be made after the "satisfactory completion" of the well and compliance with other conditions; and that plaintiffs undertook the work at their own risk, and, failing to obtain water in the quantity and on the conditions provided, should receive no pay. The supreme court before proceeding to the construction of the contract in dispute announced the general rule of law on the subject: "There is," it said, "no reason of public policy which prevents parties to a contract for the performance of work from agreeing that the decision of one or the other, or of a third person, as to the sufficiency of the performance, shall be conclusive. Having voluntarily assumed the obligations and risks of a contract, their legal rights and liabilities are to be determined solely according to its provisions. This is notably so where the matter is one of taste or fancy, but also where the contract is to furnish a piece of machinery or other article, the suitability of which involves a question of mechanical fitness to do certain work or accomplish a certain purpose. The only limitation is that the party must fairly and honestly test the work, and be dissatisfied in good faith." Continuing, the court say: "There are a few cases which seem to hold that 'that which the law will say a contracting party ought in reason to be satisfied with the law will say he is satisfied with;' and they submit to judicial triors the question, not whether he is satisfied, but whether, as a reasonable man, he ought to be satisfied. But in these cases it will be found that there is some peculiarity in the subject-matter of the contract, as in *Boiler Co. v. Garden*, where the contract was to make certain repairs, which, being made, though not entirely satisfactory, were used and enjoyed by the employer; or the case of *Metal Co. v. Best*, 14 Mo. App. 503, where also the fruits of the labor of the one party were retained and enjoyed by the other." Turning at last to the construction of the contract, the court held that under its terms the defendant assumed the risk of any deep-strata water being suitable for its use, and could not avoid payment on the ground that it was not. "It was," said the court, "not the well with which, by the terms of the contract, defendant is to be satisfied, but the completion of the well by plaintiffs in substantial compliance with their promises. The

dissatisfaction which can be set up as a defense to the action must not be caused, in whole or in part, by the quality of the water, nor by any considerations other than such as are connected with the sufficiency of plaintiffs' performance of their contractual obligations.

Other cases reach the same conclusion on different grounds. In *Duplex Safety Boiler Co. v. Garden*,<sup>55</sup> the plaintiff agreed to alter the defendant's boilers, the price to be paid as soon as the defendants "are satisfied that the boilers as changed are a success, and will not leak under a pressure of 100 pounds of steam." The work was completed; the defendants made it available, and continued to use it without objection or complaint until being sued for the compensation they set up the plea of dissatisfaction. Certainly the facts showed a waiver on their part, and a mere allegation of dissatisfaction was held no answer to the action.<sup>56</sup> In *Pope Iron Co. v. Best*,<sup>57</sup> the action was brought to recover damages for the breach of a contract, whereby the defendant agreed to build a furnace which he guaranteed would work "satisfactorily" in melting iron, and which was to be paid for as soon as the first heat was "satisfactorily run off." The defendant filed a counterclaim for the balance due him in erecting the furnace. A verdict for the defendant on the plaintiff's claim and his own counterclaim was affirmed on appeal. The decision is right though the legal grounds on which it is really based are not clearly stated. The plaintiff by bringing his action for damages treated the words of the contract "guaranteed the said furnace to work satisfactorily," as a warranty—as they really are—and not as a mere suspensory condition.<sup>58</sup> In this view the words must mean that it should work "satisfactorily to a reasonable and fair-minded man who was an expert on such matters." In *Keeler v. Clifford*,<sup>59</sup> a contract for grading provided for the payment of an installment of the price as each one-fourth part of the work was finished. The contract provided that "all of said grading is to be done to the satisfaction of" the defendant. The plaintiff completed three-fourths of

<sup>55</sup> 101 N. Y. 387, 54 Atl. Rep. 709.

<sup>56</sup> See also *Logan v. Berkshire Apartment Co.*, 18 N. Y. (Supp.) 164, 20 *Id.* 369, 22 *Id.* 776.

<sup>57</sup> 14 Mo. App. 502.

<sup>58</sup> See *ante*.

<sup>59</sup> (Ill.) 46 N. E. Rep. 248.

the work, but as the defendant refused to pay he abandoned the contract and sued for the value of what he had done. The supreme court held that he was entitled to recover the price agreed upon for the finished portion of the work, and that an instruction that if the jury should find from the evidence that the work which was performed by the plaintiff, and the grading done by him, were not done to the satisfaction of the defendant, then their verdict should be in favor of the defendant, was properly refused, "because" said the court, "where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is that it must be done in a manner satisfactory to the mind of a reasonable man." The ruling was probably correct; three-quarters of the work having been done and three payments having been neglected, it was certainly rather late in the day for the defendant to set up his dissatisfaction. But the principle asserted by the court to sustain its position is not law.

*Cases Really Discordant.*—In *Mullally v. Greenwood*,<sup>60</sup> the defendant agreed to pay the plaintiff a certain commission if he negotiated a "satisfactory lease" of certain premises. The plaintiff negotiated a lease which the defendant claimed was not satisfactory. The trial court left it to the jury to say whether the lease was a satisfactory lease as a matter of fact; which action was affirmed in the supreme court, Burgess, J., saying: "The court would not have been justified from the facts and circumstances as disclosed in holding that the plaintiff intended to submit the result of his labors to the caprice of defendants or any one of them to approve or reject at will, regardless of any just cause or excuse therefor. We are not disposed to construe those words so as to procure a result so disastrous to plaintiff and inconsistent with the ordinary experience of mankind."<sup>61</sup> In *Folliard v. Wallace*,<sup>62</sup> an early New York case, the action was one of covenant. Land had been sold and conveyed upon a consideration

payable three months after the vendee "should be well satisfied that they held the said 600 acres of land undisputed by any person whatsoever." The plea was that the defendants "were not satisfied that the said land can be held undisputed by any person whatsoever," and a claim in favor of certain third persons was said to exist. The replication set up that the claim said to be outstanding had been decided under an arbitration some time previous. The plea was held bad, Kent, C. J., saying: "Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. But here was a real obligation contracted, and the true and sound principle is laid down in Pothier<sup>63</sup> that, if A promises to give something to B in case he should judge it reasonable, it is not left to A's choice to give it or not, since he is obliged to do so in case it be reasonable. The law in this case will determine for the defendant when he ought to be satisfied." It is plain that the suspensory character of a condition of this character does not occur to the learned judge; and it is no less plain that the rule of the civil law on which he relied, is not the common law rule in such cases.<sup>64</sup> In a New York

<sup>60</sup> 127 Mo. 138.

<sup>61</sup> Yet in the same court, in a subsequent case already referred to (*Blaine v. Knapp* [Mo.], 41 S. W. Rep. 757) a different view was taken where the agreement was to pay for services as an advertising solicitor of a newspaper. The result was equally "disastrous to plaintiff," but as the same judge very properly put it, "This was his contract, and by its terms the law must be meted out to him."

<sup>62</sup> 2 Johns. 395; *Burns v. Munger*, 45 Hun, 75.

<sup>63</sup> *Traite's des Obligations*, No. 48.  
<sup>64</sup> The right view of contracts of this kind is taken by the Supreme Court of Appeals of Virginia in *Averett v. Liscomb*, 70 Va. 404 (1882). Here, at an auction sale of real estate, it was announced by the auctioneer that any purchaser should have the right to examine the title, and if he was not satisfied with it he would not be required to comply with the terms of the sale. The defendant, to whom the land was knocked down, refused to complete the purchase on the ground that he was not satisfied with the title. Specific performance of the agreement was refused. "It is immaterial," said Burks, J., "that this court now considers that the vendors were, and are, able to make good title. That is not the question. The contract left it to the purchaser to determine for himself the matter of title. If, on examination, he was not in good faith satisfied with the title, he was not to be bound. The bargain was at end." Citing *Wilham v. Edwards*, 2 Sim. 78, a very similar case. And see *Church v. Shanklin*, 17 L. R. A. 207 (Cal., 1892), where it is held that a vendee cannot be compelled to accept a title which is, in fact, perfect, but which his attorney, in good faith, refuses to approve, where the contract re-

case, decided in an inferior court, the articles of a building association provided that in case any member by sickness, removal, or misfortune, became unable to pay his dues he might withdraw, "and in case the board of trustees are satisfied as to the ground of withdrawal, the whole amount of subscription paid by the party into the association shall be returned." It was held that the plaintiff was entitled to a return of his money if he showed such facts as in law should have satisfied the trustees.<sup>65</sup>

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quires the title to be perfected "to the satisfaction" of such attorney.

<sup>65</sup> *Wetterwalgh v. Knickerbocker Bldg. Assn.*, 2 Bosw. 381. In *City of Brooklyn v. R. Co.*, 47 N. Y. 476, it is said: "Such satisfaction is not an arbitrary or capricious (*sic.*) one. It has its measure by which it can be filled. That which the law shall say a contracting party ought, in reason, to be satisfied with, that the law will say he is satisfied with," citing *Folliard v. Wallace*, 2 Johns. 395. And see to the same effect, in a city court in New York, *Hummel v. Stirn*, 36 N. Y. (Sup.) 443.

#### MALPRACTICE—DENTIST—NEGLIGENCE—DAMAGES.

MCCRACKEN v. SMATHERS.

*Supreme Court of North Carolina, March 15, 1898.*

1. A dentist not possessing the learning and skill ordinarily possessed by members of his profession, injuring a patient by improper treatment, is liable therefor.

2. A physician and surgeon holds himself out to possess and will be held to apply the degree of learning and skill ordinarily possessed by his profession existing at the time of his practice, and not what may have existed prior thereto.

3. The care and skill required of a dentist is not that exercised by his profession in his particular neighborhood, but that exercised by his profession generally.

4. The naked fact that a patient of a dentist was guilty of contributory negligence, not coupled with the fact that the dentist used ordinary skill and his best judgment, is not a bar to the patient's recovery for maltreatment.

5. A jury, in fixing the damages in malpractice by a dentist, may consider the injury to the patient, such as the pain, loss of time, loss of teeth, and increased delay in effecting a cure, and probability of permanent injury necessarily consequent upon the injury.

DOUGLAS, J.: This case was before this court at September term, 1896, the opinion being in 119 N. C. 617, 26 S. E. Rep. 157. The defendant asked the witness: "If the patient, after receiving treatment, should be directed to return in a

week, and should fail to do so, is it regarded by the profession as the duty of the dentist to seek the patient?" and "at what time does the relation of physician and patient cease?" the plaintiff objecting, and, the objection being sustained by the court, the defendant excepted. The court charged the jury, in response to prayers of plaintiff: "(1) That if defendant did not, at the time of treating the plaintiff, possess the learning and skill ordinarily possessed by members of the dental profession, and by improper treatment the plaintiff was injured, the defendant would be liable for such damage as the plaintiff sustained by reason thereof, and the jury should answer the first issue, 'Yes.' Defendant excepted. "(2) The degree of learning and skill which the physician and surgeon holds himself out to possess is that degree which is ordinarily possessed by the profession, as it exists at the time or contemporaneous with himself, and not as it may have existed at some time in the past; and the physician and surgeon must, in general, be held to apply in his practice what is thus settled in his profession." Defendant excepted. "(3) That, if the defendant did possess the learning and skill which ordinarily characterize his profession, and failed to exercise it in this case, and the plaintiff was injured in consequence thereof, the defendant would be liable to such damages as the plaintiff sustained." This was given with further explanation as to contributory negligence, and the defendant excepted. "(7) That the jury, in fixing the damage, may take into consideration the injury the plaintiff sustained by the unskillful treatment of the case. Of such would be the pain, loss of time, suffering, loss of teeth, and increased delay in effecting a cure, and probability of permanent injury, necessarily consequent upon the injury sustained by the maltreatment." This was given and the defendant excepted. The defendant asked six special instructions, four of which were given in full, and the sixth given with slight modification. The third and sixth prayers are as follows: "(3) The care and skill required of the defendant is not the highest degree of knowledge and skill known to the profession, but such as is possessed by men of his profession in the neighborhood." "(6) The defendant is responsible to the plaintiff only for ordinary care and skill and the exercise of his best judgment; not for the want of the highest degree of skill. It was the duty of the plaintiff to cooperate with the defendant, and to conform to his advice; and, if he advised her to return upon the tooth's giving her trouble, and she did not return, either from want of inclination, because her father was busy with the horses, or on account of sickness, it was her own neglect, and she cannot recover of defendant for her own neglect;" to which the court added, "Provided, the defendant used ordinary skill and his best judgment." The court refused the third instruction, and gave the sixth with the modification above set forth, to-wit: "Provided the defendant used ordinary skill and his best judgment." To the modification of the

sixth instruction the defendant excepted. The court instructed the jury on negligence generally, to the charge as given, and defendant excepted.

Referring to the first and second exceptions, we think that under the circumstances of this case the questions objected to were properly excluded, as being too general, and not pertinent to any material issue. If there were error in excluding them, it was fully cured by the fifth prayer of the defendant, given in full by the court. Nor do we see any error either in the instructions given or the refusal of prayers. The plaintiff alleged two distinct acts of malpractice—one in originally filling the tooth upon a live nerve, without proper packing; and the other in improperly and unnecessarily boring through the jawbone after the plaintiff had returned for treatment. Whether this malpractice, found by the jury, arose from the want of ordinary knowledge or skill, or the want of reasonable care on the part of the defendant, is immaterial, as both are impliedly guarantied by one offering his services to the public. The degree of care and skill required is that possessed and exercised by the ordinary members of his profession. It need not be the highest skill and knowledge known to the profession, but it must be such as is ordinarily possessed by the average of the profession. It cannot be measured simply by the profession in the neighborhood, as this standard of measurement would be entirely too variable and uncertain. "Neighborhood" might be construed into a very limited area, and is generally so understood among our people. It might contain but few dentists, in sparsely settled sections perhaps only one or two. Both might be men of very inferior qualifications, and to say that they might set themselves up as the standard of a learned profession, and prove the standing of each by the ability of the other, would be equally unjust to the profession and to its patients. The words "the neighborhood," as used in the prayer, are essentially different from the phrases, "the same general neighborhood" or "the same general locality," which are found in some decisions from other States. In the well-considered case of *Gramm v. Boener*, 56 Ind. 497, 501, the court says: "It seems to us that physicians or surgeons practicing in small towns or rural or sparsely populated districts are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It will not do, as we think, to say that if a surgeon or physician has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practices it will be sufficient." The third prayer of the defendant was, therefore, properly refused. Nor should his sixth prayer have been given without modification. The court was asked to charge, in substance, that, if the plaintiff had failed to return, no matter from what cause, when the tooth began to give trouble, she would be guilty of contributory negligence, and could not recover, no matter how

great the fault of the defendant. We think that the charge of the court, especially in the fifth prayer given, presented the question of contributory negligence in a view sufficiently favorable to the defendant, and the finding of the jury that the plaintiff was not guilty of contributory negligence settles that question. In any event, the alleged negligence of the plaintiff in not returning within a proper time could not have contributed to the second act of malpractice in improperly boring into her jawbone; nor did it cause the first act of malpractice, but at best could only have aggravated its effects. We think the jury were sufficiently instructed that the defendant would not be liable if he had exercised ordinary skill and care, and that, if he failed in either of these particulars, he would be responsible for the damages resulting from his own acts alone. In *DuBois v. Decker*, 130 N. Y. 325, 29 N. E. Rep. 313, it was held that, "when a liability for negligence or malpractice is established, proof that the patient, after the liability was incurred, disobeyed the orders of the physician, and so aggravated the injury does not discharge the liability, but simply goes in mitigation of damages." The rule as to ordinary or reasonable skill and care is alluded to in *Woodward v. Hancock*, 52 N. C. 384, and in *Boon v. Murphy*, 108 N. C. 187, 12 S. E. Rep. 1032, but is not fully discussed. We think that the rule as herein laid down is fully in accord with those decisions, and is sustained by the weight of authority in other jurisdictions. Where a different rule is followed, it is almost invariably of a more stringent nature. *Shear & R. Neg.* §§ 431, 443; *Smothers v. Hanks*, 34 Iowa, 286; *Teff v. Wilcox*, 6 Kan. 46; *Elwell, Malp.* 31, 53; *Howard v. Grover*, 28 Me. 97; *Simonds v. Henry*, 39 Me. 155; *Patten v. Wiggin*, 51 Me. 595; *Landon v. Humphrey*, 9 Conn. 209; *Reynolds v. Graves*, 3 Wis. 416; *Gallaher v. Thompson*, *Wright*, 466; *Bowman v. Woods*, 1 G. Greene, 441; *Leighton v. Sargent*, 7 Fost. 460; *Wilmot v. Howard*, 39 Vt. 447; *Small v. Howard*, 128 Mass. 131; *Carpenter v. Blake*, 10 Hun. 358; *McCandless v. McWha*, 22 Pa. St. 261; *McCl. Malp.* 18, 32.

The last exception, where neither the obnoxious instructions are given nor the errors pointed out, cannot be considered, being essentially broadside. No error appearing, the judgment is affirmed. Affirmed.

**NOTE.—Recent Decisions on Malpractice by Physicians and Surgeons.**—The failure of a physician to discover, after repeated examination for the purpose, a serious rupture of the perinaeum, sustained at childbirth, is negligence for which he is liable. *Lewis v. Dwinell*, 24 Atl. Rep. 945, 84 Me. 497. A surgeon, in the treatment of his patient, must exercise that degree of knowledge and skill ordinarily possessed by members of the medical profession. *Hewitt v. Eisenbart (Neb.)*, 55 N. W. Rep. 252. Physicians and surgeons are required to exercise ordinary skill and diligence; that is, the average of that possessed by the profession as a body, and not by the thoroughly educated alone, having regard to the improvements and advanced state of the profession at the time of the treatment. *Peck v. Hutchinson (Iowa)*, 55 N. W.

Rep. 511. In an action for malpractice, where the theory of the defense was that plaintiff had discharged defendant on October 11, and that subsequent to that date plaintiff had been negligent, an instruction that plaintiff could not recover if, by his own negligence, he directly contributed in any degree to the injury sued for is misleading, since negligence on the part of plaintiff subsequent to October 11th would not defeat his right of recovery, provided he proved that the conduct and treatment of defendant up to that date had been utterly unskillful and negligent. *Lawson v. Conaway*, 16 S. E. Rep. 564, 37 W. Va. 179. A physician undertaking the treatment of a patient employing him, contracts that he possesses ordinary skill, and that he will use ordinary care and exercise his best judgment in the application of his skill. *Cayford v. Wilbur*, 29 Atl. Rep. 1117, 86 Me. 414. In an action for a negligent operation by a dentist, it was error to refuse to charge that a dentist does not insure the result of his work, and is not responsible for a mistake of judgment. *Wilkins v. Ferrell* (Tex. Civ. App.), 30 S. W. Rep. 450. An instruction that defendant, sued for malpractice, is not liable if he exercised his best judgment in diagnosing and treating plaintiff's case, although he may have been mistaken as to the true character of the disease, is properly refused, as exempting defendant from liability if he used his best judgment, although he may have been careless in making his diagnosis, or the proper mode of treatment may not have been involved in doubt. *Jackson v. Burnham* (Colo. Sup.), 39 Pac. Rep. 577. An instruction that a physician is liable for malpractice if he omitted the ordinary and established mode of treatment, no matter how much skill he may have possessed, is not misleading, where there is no claim that the case was one involving doubt as to the proper mode of treatment, and the issue and testimony relate solely to the question whether defendant neglected to follow the ordinary and clearly established practice in treating plaintiff. *Jackson v. Burnham* (Colo. Sup.), 39 Pac. Rep. 577. Error cannot be predicated of an instruction requiring a physician, in determining whether a patient has sufficiently recovered to require no further medical or surgical attention, to exercise reasonable and ordinary care and skill, and to have regard to, and take into account, the well-settled rules and principles of medical and surgical science. *Mucci v. Houghton* (Iowa), 57 N. W. Rep. 305. Though the surgeon negligently failed to properly reduce the fracture of the limb, the patient cannot recover of the surgeon damages for the limb becoming stiff, where the stiffness resulted in part from the patient's violation of the surgeon's orders in treating the limb. *Young v. Mason* (Ind. App.), 35 N. E. Rep. 521. Defendant, a practicing physician, who promised plaintiff to attend his wife, instead of doing so, sent another physician, who, by his unskillfulness, seriously affected the wife's health. Held, that defendant was not liable for the injury, since the other physician was engaged in an independent occupation. *Myers v. Holborn* (N. J. Err. & App.), 33 Atl. Rep. 389. Where plaintiff, in an action for malpractice, claimed that a certain bandage was negligently placed on his arm by defendant, causing him excessive pain, and defendant introduced evidence of directions given plaintiff, which, if followed, would have saved the trouble complained of, it was proper to instruct as to plaintiff's duty to follow defendant's directions, and as to the care which he should have used. *Whitesell v. Hill* (Iowa), 66 N. W. Rep. 894. An instruction that if the plaintiff, by his negligence in leaving the hospital, contributed to the existing injuries, his right

to recovery was limited to the damage suffered before leaving the hospital, was erroneous, it being impossible to say what would have been the result of the treatment given by defendant if plaintiff had remained in the hospital. *Richards v. Willard*, 35 Atl. Rep. 114, 176 Pa. St. 181, 38 W. N. C. 400. Where, in an action for malpractice alleged to have caused the disablement of plaintiff's arm, the answer charged that plaintiff was guilty of contributory negligence, it was proper to instruct as to the care required of plaintiff, and his necessity to follow defendant's instructions. *Whitesell v. Hill* (Iowa), 66 N. W. Rep. 894. An instruction requiring a judgment for defendant unless plaintiff shows, by a preponderance of the evidence, a state of facts from which no other "rational conclusion" can be drawn than that defendant was unskillful, required too high a degree of proof on plaintiff's part. *Pelky v. Palmer* (Mich.), 67 N. W. Rep. 561. A physician is not a warrantor of cures, in the absence of an express contract to that effect. His implied obligation arising from his employment is only that no injury shall result from any want of care or skill on his part. *Ewing v. Goode* (C. C.), 78 Fed. Rep. 442. A physician is required to exercise that degree of knowledge and care which physicians practicing in similar localities ordinarily possess, and not merely the knowledge, etc., possessed by physicians practicing "in his locality." *Whitesell v. Hill* (Iowa), 70 N. W. Rep. 750. Unexplained, the fact that the physician attending a woman at childbirth, failed to remove all the placenta, thereby occasioning blood poisoning, justified a conclusion of negligence. *Moratzky v. Wirth* (Minn.), 69 N. W. Rep. 480. Mere lack of skill or negligence without injury gives no right to recover even nominal damages. *Ewing v. Good* (C. C.), 78 Fed. Rep. 442. In an action against a physician for negligence, it appeared that plaintiff, who was engaged to marry a daughter of M, was falsely accused of being afflicted with a venereal disease. At M's request, plaintiff was examined by defendant, who mistakenly pronounced the disease venereal, and so informed M and his family, resulting in the breaking of the engagement. Held, that the fact that information, and not medical treatment, was sought, does not excuse negligence in making the diagnosis. *Harriott v. Plimpton*, 44 N. E. Rep. 992, 168 Mass. 585. It appeared that there were several educated and experienced physicians who practiced in the town where defendant resided, and vicinity. Held, that plaintiff was not prejudiced by an instruction that a physician is required to exercise that degree of skill, etc., possessed by physicians practicing "in his locality," instead of "in similar localities." *Whitesell v. Hill* (Iowa), 70 N. W. Rep. 750. In an action against a physician for malpractice, the court charged that a physician must exercise the average degree of skill possessed by physicians in his locality, and that negligence consists in the doing by defendant, in treating plaintiff, of some act which a physician possessing such average skill would ordinarily do under like circumstances, or the omission to do some act which such a physician would ordinarily do under like circumstances. Held, that the instructions were not inconsistent. *Whitesell v. Hill* (Iowa), 70 N. W. Rep. 750. In an action against a physician who held himself out as a specialist in treatment of the eye, to recover for any injury claimed to have been caused by him in performing an operation on the eye, a verdict for plaintiff was not warranted. Where there was no evidence of want of requisite knowledge, skill, or care on the part of defendant, and the evidence for the defense was positive and uncontradicted that the operation was a proper

one, and was performed in a skillful and careful manner, and that it was a physical impossibility for it to have caused the injury complained of. *Feeney v. Spaulding*, 35 Atl. Rep. 1027, 89 Me. 111. Under complaint alleging negligent and unskillful treatment of plaintiff's finger by defendant, resulting in injury, recovery cannot be had for failure of defendant, after treating it, to be present at his office, and render such services as the finger may have required. *Dashiell v. Griffith*, 35 Atl. Rep. 1094, 84 Md. 363. In an action for malpractice in setting and treating a broken arm, the measure of damages is the damage accruing to plaintiff in excess of that which would have accrued naturally from the breaking of his arm, had he been treated with that degree of skill ordinarily possessed by surgeons, and not the damage resulting from the breaking of the arm. *Miller v. Frey* (Neb.), 68 N. W. Rep. 630, 49 Neb. 472. A complaint in an action for malpractice was sufficient where it alleged that plaintiff's leg was broken; that he employed defendant to examine the injury and treat the leg; that defendant did examine it and undertook to treat it; that he failed to ascertain that the leg was broken, or the extent of the injury; that he treated it as though it was not broken; and that by reason thereof plaintiff suffered much pain and was put to great expense, to his damage. *Crowty v. Stewart* (Wis.), 70 N. W. Rep. 558.

#### BOOKS RECEIVED.

**Mandamus Cases**, decided in the Supreme Court of Michigan. Including a Synopsis of all Reported Mandamus Cases to January 1, 1898, and of hitherto Unreported Cases from January 1, 1891, to July 1, 1897. Compiled by John W. McGrath. Detroit. John F. Eby & Co., Printers, 1898.

#### WEEKLY DIGEST

OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMINISTRATION — Appointment of Administrator — Collateral Attack. — The appointment of an administrator may be collaterally attacked when the record affirmatively shows the court granting the letters acted without jurisdiction. — *ELGUTTER v. MO. PAC. RY. CO.*, Neb., 74 N. W. Rep. 253.

2. ADMINISTRATION — Sale of Mortgaged Chattels. — Code Civ. Proc. § 2810, gives a preference to mortgages and certain other classes of claims against a decedent's estate, but contains no provision in reference to payment of expenses of administration. Section 2811 provides that the preference given to mortgages extends only to the proceeds of the property mortgaged: Held, that an administrator, on a sale of mortgaged chattels, must pay the mortgage debt, less the expense of sale, out of the proceeds of such sale, before he may apply any portion thereof toward the expenses of administration. — *IN RE HORSEFALL'S ESTATE*, Mont., 52 Pac. Rep. 199.

3. ADOPTION — Validity — Rights of Child. — Under 1 Wag. St. p. 256, § 1, providing that a person may adopt a child as his heir by a deed executed and recorded as in the case of conveyances of real estate, a deed of adoption is valid though not consented to by the natural parents of the child. — *CLARKSON v. HATTON*, Mo., 44 S. W. Rep. 761.

4. ADVERSE POSSESSION — Tacking Possessions. — Where one of several co-tenants was given a deed of the land from the tenant in possession who was holding adversely to the others, all believing that the latter was the sole owner, the subsequent possession of the grantee under his deed may be tacked to the possession of his grantor, so as to create a bar by limitations against the remaining co-tenants. — *WHEELER v. TAYLOR*, Oreg., 52 Pac. Rep. 183.

5. APPEAL — Appellate Jurisdiction. — Title to real estate is not involved, so as to give the supreme court jurisdiction, by *mandamus* proceedings to compel the levy of a tax to pay a certain sum alleged to have been awarded relator by commissioners in a condemnation suit. — *STATE v. SCHOOL DIST. NO. 1, TOWNSHIP 23, RANGE 20, IN GREENE COUNTY, MO.*, 44 S. W. Rep. 720.

6. APPEAL — Supersedeas Bond. — Where a *supersedeas* bond recites a judgment in favor of appellee for money, and giving to him a lien therefor superior to the lien of appellant on the same property, and further recites that "appellant desires to supersede said judgment, in so far as same adjudges the lien of appellee superior to that of appellant," the covenant of the bond, "to satisfy and perform the judgment above stated, in case it shall be affirmed," does not bind the obligors, in the event of affirmance, to satisfy the personal judgment. — *GILBERT v. BAMBERGER*, Ky., 44 S. W. Rep. 421.

7. APPEAL — When Lies. — Two of several defendants appeared before service was had, and the court granted a motion by them to strike plaintiff's amended complaint and for judgment of nonsuit: Held, that an appeal by plaintiff would lie, though the other defendants were not served and did not appear, and the action

was not dismissed as to them.—**KEEF V. TIBBALS**, Wash., 52 Pac. Rep. 227.

8. **ASSIGNMENTS**—Suit by Assignor.—An obligor in a chose in action cannot complain that the judgment thereon was rendered in the name of the assignor thereof, where the assignee had so identified himself with the litigation as to make the judgment conclusive against him.—**CLEVELAND V. HEIDENHEIMER**, Tex., 44 S. W. Rep. 551.

9. **ASSIGNMENT FOR BENEFIT OF CREDITORS**—Preferences—Partnership Debt.—A deed of assignment, made under the assignment law, which, after conveying all the assignor's unexempt property, directs the assignee to "dispose of the same (all the property) in the manner provided by said law," is not void, as directing a sale at public auction of the choses in action assigned, contrary to the statute.—**ADAMS V. ALLEN-WEST COMMISSION CO.**, Ark., 44 S. W. Rep. 462.

10. **ASSIGNMENTS FOR CREDITORS**—Contracts between Assignor and Assignee.—A sale of property by the assignee to the assignor, to be paid for out of property set apart to the assignor as exempt, is valid, as the contract does not relate to the trust estate.—**SIMPSON V. GREENWELL**, Ky., 44 S. W. Rep. 433.

11. **ASSUMPSIT**—Money Had and Received.—A complaint alleged that cotton was shipped to defendants, to be sold by them, and the proceeds applied to plaintiff's lien. That plaintiff spoke to defendants in regard to the cotton and they recognized his prior lien, and agreed to sell it for him, charging a certain commission; that after the sale they refused to pay plaintiff if the amount received therefor. Held, sufficient to constitute a cause of action.—**PEEPLES V. WERNER**, S. Car., 29 S. E. Rep. 2.

12. **ATTACHMENT**—Trial of Right of Property.—On trial of the right of property, it appeared that the owner of cotton delivered it to the gin for claimant mortgagee, pursuant to agreement, and the gin received and held it for claimant. Held, that a complete delivery was effected, so that the possession of the gin was that of claimant.—**ADAMS V. POWELL**, Tex., 44 S. W. Rep. 547.

13. **ATTACHMENT**—Wrongful Attachment.—Evidence examined, and held sufficient to entitle the defendant to have the case submitted to the jury on the theory that the sale in question was merely colorable, and made to hinder or delay a creditor in the collection of his claim.—**BENNETT V. WARNER**, Neb., 74 N. W. Rep. 281.

14. **BANK**—Default of Agent—Agency.—When a note is deposited with one bank, to be collected at a point where it has no agent, and it transmits the same to another bank for collection, in the absence of any special agreement or custom of bankers, which fixes another measure of liability, the bank to which the note is sent is the agent of the bank with which the deposit was made, and it is responsible to the depositor for the defaults of such agent.—**SCHUMACHER V. TRENT**, Tex., 44 S. W. Rep. 460.

15. **BENEFICIAL SOCIETIES**—Designating Beneficiary.—The endowment fund law of a beneficial society, providing that a member shall designate his beneficiary in a book to be kept in the lodge room, or, in case he is away from where his lodge is located, by a writing duly acknowledged, and that, if he make no valid declaration of beneficiaries, and leave no wife or children, no endowment shall be paid, does not allow brothers of a member who, though having neither wife nor children, designated no beneficiaries, to claim as beneficiaries, merely because, when he became a member, there was no book in the lodge in which to designate beneficiaries, and the secretary told him he would bring it to make such designation, but failed to do so, though the member then told the secretary that he wished to designate his brothers.—**LOWENTHAL V. DIST. GRAND LODGE**, No. 2, I. O. B. B., Ind., 49 N. E. Rep. 610.

16. **BILLS AND NOTES**—Action—Parties.—An action upon a promissory note payable to the order of a

named person, with the word "president" written after his name in the note, is maintainable by such person in his individual capacity; nor does it matter that his name in the declaration is followed by the words "president of," and other words purporting to express the name of a corporation. Such an action is to be treated as one brought by the individual named.—**LESTER V. MCINTOSH**, Ga., 29 S. E. Rep. 7.

17. **BILLS AND NOTES**—Chattel Mortgage—Release of Sureties—Where the maker of a note secures its payment by chattel mortgage, and the payee of the note indorses and delivers it to a third party, his failure to seize the mortgaged property for the purpose of satisfying the note, even though requested so to do by the sureties of the maker, will not, of itself, discharge them.—**MYERS V. FARMERS' STATE BANK OF EMERSON**, Neb., 74 N. W. Rep. 252.

18. **BILLS AND NOTES**—Extension of Time—Bona Fide Purchasers.—The extension of the time of payment of a note by the holder by an indorsement thereon, without the knowledge or consent of the maker, is a material alteration, and ineffectual, so that one taking the note and the mortgage securing it, after the original time, but before the extended time, of payment has expired, takes them subject to payments made to the assignor, not indorsed on the note.—**AVIRETT V. BARNHART**, Md., 39 Atl. Rep. 532.

19. **BILLS AND NOTES**—Negotiable Note.—An instrument with recitals that, standing alone, would constitute a negotiable note, with S as maker and L as payee, is none the less so because of recitals that its consideration is a fountain which S had received from L, but that it is understood and agreed by the parties that the title to said article does not pass to S, and that till the note is paid the title shall remain in L, who shall have the right, in case of non-payment of note, "without process of law, to enter and retain immediate possession of said property;" a sale with reservation of title by way of security being implied.—**CHROATE V. STEVENS**, Mich., 74 N. W. Rep. 289.

20. **BILLS AND NOTES**—Negotiable Note.—Where the indorsee sues the maker of a negotiable note, and defendant sets up an original want of consideration, the burden of proof is on defendant to show facts that would entitle him to establish such defense against the indorsee.—**GRAHAM V. LAWRENCE**, Tex., 44 S. W. Rep. 558.

21. **BILLS AND NOTES**—Release of Surety.—Sureties on a note are released by a definite extension of time in consideration of interest in advance, and without their knowledge or consent.—**SCHIEBER V. TRAUDT**, Ind., 49 N. E. Rep. 605.

22. **BONDS**—Penalty—Liquidated Damages.—A bond is *prima facie* a penal obligation, and the burden of proving that the sum named therein was intended as liquidated damages rests on the party alleging such intention.—**O'KEEFE V. DYER**, Mont., 52 Pac. Rep. 196.

23. **BOUNDARIES**—Calls and Distances—Maps.—In an action involving boundary lines, where it is necessary to locate the thread of a changeable stream at the time of a particular survey, if the calls for courses and distances in the field notes of the survey lead to where the stream might naturally have been at the time, then such calls tend to show that the thread was where they indicate, and that the surveyor intended to, and did, locate it there, rather than at a point determined, not only by varying the calls for courses and distances, but by disregarding fixed points.—**TAYLOR V. MC CONIGLE**, Cal., 52 Pac. Rep. 189.

24. **BROKERS**—Agency—Commission.—Where a broker, acting merely as a middleman to find a purchaser for property at a fixed price, at a certain commission, and having nothing to do with the contract of sale, which is left entirely with the parties, brings a vendor and vendee together, he may recover compensation.—**McKENZIE V. LEGO**, Wis., 74 N. W. Rep. 249.

25. **CARRIERS**—Connecting Lines.—The acceptance by a railroad of freight from a connecting line, trans-

porting it to its destination within the State on a through waybill made by the initial carrier to the shipper, and receiving its proportion of the through rate fixed by the railroad commission, is such acquiescence in, and action on, a contract for through carriage as will, under Rev. St. 1895, art. 331a, relating to the liability of connecting carriers on contracts for through carriage within the State, render the railroad company liable for injuries done to the shipment on the line of the initial carrier.—*TEXAS & P. RY. CO. v. RANDLE, Tex.*, 44 S. W. Rep. 603.

26. **CARRIERS OF GOODS—Interstate Commerce.**—A common carrier transporting freight under contract for its shipment from one point to another in the same State, for delivery on arrival at the latter point to another carrier for transportation out of the State, is engaged in interstate commerce, and is not subject to the State railway commission regulations.—*STATE v. GULF, C. & S. F. Ry. Co., Tex.*, 44 S. W. Rep. 542.

27. **CARRIERS OF GOODS—Loss by Fire.**—In an action against a railroad company for loss by fire of cotton shipped under a bill of lading exempting defendant from liability from such cause, where there is evidence of negligence on the part of defendant, a peremptory charge to find for defendant is error.—*NEWBERGER COTTON CO. v. ILLINOIS CENT. R. CO., Miss.*, 23 South. Rep. 186.

28. **CARRIERS OF PASSENGERS—Damages—Evidence—Exclusion on Motion.**—Where a common carrier has furnished a competent physician to attend on injured passengers, it is not liable for his malpractice or neglect.—*GALVESTON, H. & S. A. Ry. Co. v. SCOTT, Tex.*, 44 S. W. Rep. 589.

29. **CERTIORARI TO REVIEW JUDGMENT.**—Where a petition for certiorari sets out the names of the parties, though informally, the failure to set out the name of the places of residence of some of them is not sufficient ground for dismissal.—*PARLEN & ORENDORFF CO. v. BELLOWES, Tex.*, 44 S. W. Rep. 593.

30. **CHATTEL MORTGAGES—Failure to Index.**—Where the county clerk kept a special index for the chattel mortgage record, one who had been damaged by failure to enter therein the filing of a certain mortgage was entitled to complain, though such officer also kept a file index, in which was entered, at the time of filing, the names of grantor and grantee, in reverse order, the kind of instrument, the date thereof, and the date of filing, and in which the mortgage in question was duly entered.—*MORTON v. SMITH, Tex.*, 44 S. W. Rep. 683.

31. **COMPROMISE AND SETTLEMENT—Equity.**—One who had a settlement with his partner, and for more than three years after he must have known of any fraud in the settlement, continued to enjoy the profits arising from the labor of such partner, cannot invoke the aid of equity to set aside the settlement on the ground of fraud.—*BAKER v. CUMMINGS, U. S. S. C.*, 18 S. C. Rep. 367.

32. **CONSTITUTIONAL LAW—Municipal Bonds—Estoppel.**—Acts 1897, ch. 3 (Shannon's Code, §§ 1559-1573, inclusive), providing that any incorporated city or town, on election duly held, may become a stockholder in any railroad company organized under the general laws, and providing for the issuing of municipal bonds in payment for said stock, does not violate Const. 1870, art. 2, § 29, providing that the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, or corporation except upon an election to be first held, because not providing for an election as to the question of issuing the bonds, as such issue is not a loaning of credit, but a payment of the subscription.—*CITY OF JOHNSON CITY v. CHARLESTON, C. & C. R. Co., Tenn.*, 44 S. W. Rep. 670.

33. **CONSTITUTIONAL LAW—Taxation of Cattle on Indian Reservations.**—Territorial legislatures may impose a tax on cattle, belonging to others than Indians, which are grazing on Indian reservations within the territory, pursuant to a lease of the land for that purpose made by the Indians with the approval of the

federal authorities. Such tax is too remote and indirect to be deemed a tax on the lands or privileges of the Indians, and is not an interference with the power of congress to deal with the Indians and their property and commercial transactions.—*THOMAS v. GAT, U. S. S. C.*, 18 S. C. Rep. 340.

34. **CONSTITUTIONAL LAW—Taxation of Mortgages as Real Estate.**—The Oregon statute (Laws 1882, p. 64), providing for the taxation as real estate of all mortgages on realty situated in the State, the same to be taxed, at a fair valuation, to the persons shown by the records to be the owners, and the amount allowed as a credit on the assessment of the mortgagors as indebtedness within the State, is not unconstitutional, as taking the property of the owners without due process of law, and denying them the equal protection of the laws, though such owners may be residents of other States, and may have the mortgages and notes in their possession there.—*SAVINGS & LOAN SOC. v. MULTNOMAH COUNTY, OR.*, U. S. S. C., 18 S. C. Rep. 320.

35. **CONTRACT—Assignment.**—Where the assignee of a contract, with the implied consent of the person for whom the work was to be done, has executed the work which has been accepted, he is entitled to the contract price.—*BRALL v. COOK, Ky.*, 44 S. W. Rep. 417.

36. **CONTRACTS—Delivery of Coal—Conditions.**—Defendant agreed to deliver a quantity of coal, f. o. b. at G at a particular time, on condition that defendant was not to be responsible for damages from strikes. While the coal was en route by rail the carrier seized it and consumed it, there being at the time a great scarcity of coal, caused by a serious strike at the mines. Held, that the loss was within the condition; the term "strikes" including any strike having a legitimate tendency to prevent the execution of the contract.—*DAVIS v. COLUMBIA COAL MIN. CO., Mass.*, 49 N. E. Rep. 629.

37. **CONTRACT—Incomplete Contracts—Parol Evidence.**—When the written memorandum of an agreement for the cutting, hauling, and driving logs or wood is silent as to the scale and the scaler, and does not import upon its face to contain all the stipulations of the parties as to the subject-matter, oral evidence may be received of an additional verbal stipulation as to the scale or the scaler.—*GOULD v. BOSTON EXHIBITOR CO., Me.*, 39 Atl. Rep. 554.

38. **CONTRACT OF MARRIED WOMAN.**—Code, § 1836, provides that no married woman can, without her husband's written consent, make any contract to affect her estate, except for necessary expenses for herself or family, or when necessary to pay antenuptial debts. Held, that a married woman, residing with her husband, could not, without his consent, make a binding contract with a party to oversee a plantation owned by her separately.—*SANDERLIN v. SANDERLIN, N. Car.*, 29 S. E. Rep. 65.

39. **CORPORATIONS—Charter—Powers.**—The plaintiff claimed the right to receive water through the Surplus canal, owned by a corporation, and that its purposes were irrigation and drainage, while the defendants claimed its purpose was to carry seepage water from lands irrigated by them through their drain ditches, though unfit for irrigation, as well as other drainage water, and introduced witnesses to state their understanding of its purpose. Held, that the purpose of the canal, and the powers the corporation was authorized to exercise, must be determined from its charter, not from the opinions of witnesses.—*NORTH POINT CONSOLIDATED IRR. CO. v. UTAH & S. L. CANAL CO., Utah*, 52 Pac. Rep. 168.

40. **CORPORATIONS—Guaranty of Stock in Another Corporation.**—To hold a corporation liable on its contract to pay or guaranty dividends on the stock of another corporation, the petition must specifically set out the provisions of the charter authorizing such a contract, as one corporation cannot usually acquire or guaranty stock in another corporation.—*RHOEKER v. MIDDLESBORO TOWNS & LANDS CO., Ky.*, 44 S. W. Rep. 448.

41. CORPORATIONS—Insolvency—Preferences—Directors.—A preference by mortgage given by an insolvent corporation for the purpose of securing the payment of an antecedent debt is not necessarily void merely because a director, who has become liable as surety or indorser upon such debt, would be incidentally benefited by the giving of the mortgage; but if such a corporation executes a mortgage in favor of a creditor holding a pre-existing debt, and the purpose for which this is done is not to carry out a *bona fide* intention to secure and prefer such creditor, but really to effectuate a scheme on the part of the directors to indemnify themselves against loss by reason of their having become indorsers for the corporation on the paper secured by the mortgage, the transaction is, in law, fraudulent and void as to other creditors.—ATLAS TACK CO. V. MACON HARDWARE CO., Ga., 29 S. E. Rep. 27.

42. CORPORATIONS—Liability of Stockholders.—Const. 1875, art. 12, § 8, and Rev. St. 1889, § 2499, prohibit the issue of corporate stock or bonds, except for money paid or property actually received, and invalidate any fictitious increase of stocks or indebtedness. Rev. St. 1889, §§ 2517, 2519, provide a remedy by which any unpaid balance of capital stock may be subjected to the payment of unpaid corporate debts: Held, that where fully paid up and non-assessable stock was issued in consideration of an agreement to transfer to the corporation a worthless invention, and whatever patent might be obtained thereon, assignees taking such stock with full knowledge of the facts are liable to parties who became creditors in good faith that the stock was fully paid up, though no actual fraudulent intent on the part of the corporation or its stockholders is shown.—VAN CLEVE V. BERKEY, Mo., 44 S. W. Rep. 748.

43. CORPORATIONS—Meetings—By-laws.—Under charter provisions that alteration of by laws shall only be made by a general meeting of members convened by public notice, as in case of election of directors, and that the president, when required by 20 members, shall call the general meeting, by giving notice as in case of election for directors, for the transaction of such business as may be specified in such notice, by-laws cannot be changed at an annual meeting where notice is only given of election of directors.—MUTUAL FIRE INS. CO. OF MONTGOMERY COUNTY V. FARQUHAR, Md., 39 Atl. Rep. 527.

44. CORPORATIONS—Meetings of Directors—By-laws.—A meeting of the directors of a mining corporation, having no by-law for calling meetings, held at the office of its president, called by him on verbal notice, at which all the members were present except one, who could not have voted, because directly interested in the only business transacted, is legal, under Comp. Laws, § 2932, subd. 4, providing that, "when no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president," and the acts of the directors at such meeting are binding.—TROY MIN. CO. V. WHITE, S. Dak., 74 N. W. Rep. 236.

45. CORPORATIONS—Public Warehouse—Issue of Receipts.—A manufacturing corporation, never having operated a warehouse or stored property for any one, does not, by issuing to creditors, to secure their claims, bills of sale and what purport to be warehouse receipts on its stock kept in the same building where manufactured, become a warehouseman, under Acts 1879, p. 231 (Burns' Rev. St. 1894, §§ 8720-8729; Horner's Rev. St. 1897, §§ 6341-6350), relating to private warehousemen, and providing that every person, firm, or corporation, receiving or undertaking to receive and keep, with or without compensation, any personal property, shall be deemed a warehouseman.—FRANKLIN NAT. BANK V. WHITEHEAD, Ind., 49 N. E. Rep. 592.

46. CORPORATIONS—Subscriptions—Payment in Property.—Owners of property have a right, in disposing

of it, to place such valuation thereon as they see fit; and if, with such property at an overvaluation, they pay for capital stock issued to them by a corporation, the excess above the real value of the property cannot subsequently be treated by creditors of this corporation as never having been paid, in the absence of fraud, misrepresentation, suppression of the truth, and the violation of the obligations of law or morality, express or implied.—TROUP V. HORNBACH, Neb., 74 N. W. Rep. 326.

47. COUNTIES—Posse Comitatus.—Pen. Code, §§ 279, 1460, make it the duty of every male person over 18 years old to join the *posse comitatus* on being required by any sheriff, or other officer to do so, as authorized by Pol. Code, § 4881. Pol. Code, §§ 4286, 4681, provide that the board of commissioners shall not allow any account for official services for which no specified fees are fixed by law: Held that, as there is no statutory authority for compensation for services and expenses incurred by members of the *posse comitatus*, a county is not liable therefor.—SEARS V. GALLATIN COUNTY, Mont., 52 Pac. Rep. 204.

48. COUNTY TREASURER—Misappropriation of Funds.—Laws 1880 81, p. 231, § 6, requires the county treasurer to pay certain claims based on witness certificates out of its fine and forfeiture fund on compliance with certain conditions: Held, that any such claimant could not sue the sureties on the bond of the treasurer for a misappropriation of the moneys of such fund by the latter, since such misappropriation involved the violation of a duty to the public, and not to an individual claimant, whose cause of action arose only upon the non payment of his claim, upon presentation.—JACKSON COUNTY V. DERRICK, Ala., 23 South. Rep. 193.

49. COURTS—Supreme Court—Jurisdiction.—The expression of a "doubt" by a judge of the court of appeals as to whether the conclusion reached in the case on appeal can be harmonized with a former opinion of the supreme court is insufficient to confer jurisdiction on the supreme court, under Const. § 6, of the amendment, providing that, when the court of appeals shall render a decision which a judge shall "deem" contrary to any previous decision of the supreme court, it must transfer the case to the supreme court.—SMITH V. MO. PAC. RY. CO., Mo., 44 S. W. Rep. 718.

50. CRIMINAL EVIDENCE—Concealed Weapons.—Defendant, on trial for carrying a pistol, should not be asked by the State if he had not, on other occasions, been charged with a like offense; unlawfully carrying a pistol having no bearing on one's credibility.—BAIN V. STATE, Tex., 44 S. W. Rep. 518.

51. CRIMINAL EVIDENCE—Rape—Age of Female.—On trial for attempted rape of a female under 16 years of age, her testimony as to her age is competent.—COMMONWEALTH V. HOLLIS, Mass., 49 N. E. Rep. 632.

52. CRIMINAL LAW—Adulteration.—Under Pen. Code 1895, arts. 430, 482, prohibiting the manufacture or sale of any food which has been adulterated by adding any substance so as to reduce or injuriously affect its quality or strength, or by substituting any cheaper or inferior substance, an indictment should state the particular substance with which, and the manner in which, the article of food charged to have been manufactured or sold was adulterated.—DORSEY V. STATE, Tex., 44 S. W. Rep. 514.

53. CRIMINAL LAW—Appeal by State.—Rev. St. 1869, § 4290, giving a right to the State to appeal where an indictment is quashed, does not include the right to appeal from the quashing of an information filed by the prosecuting attorney, since the words "indictment" and "information" present two well-defined and different meanings.—STATE V. CORNELIUS, Mo., 44 S. W. Rep. 717.

54. CRIMINAL LAW—Assault with Intent to Kill.—Where a witness who has been indicted jointly with the defendant testifies for the defense that he was not present at the shooting, and did not see it done, he may be questioned on cross-examination as to his

whereabouts before and after the shooting, but he should not be asked whether he had told a third person that he saw the defendant shoot.—*STEVENSON V. COMMONWEALTH*, Ky., 44 S. W. Rep. 634.

55. **CRIMINAL LAW—Burglary.**—Where an information for burglary charges that the breaking and entering were effected with the intent to steal, it is necessary to prove that the property possessed some value, and was within the building.—*BERGERON V. STATE*, Neb., 74 N. W. Rep. 253.

56. **CRIMINAL LAW—Card Playing—Outhouse.**—A conviction for playing cards in an outhouse where people resort cannot be sustained where the building was used for no other purpose than a barn for feeding stock, and no other persons were present than defendant and another.—*STOCKTON V. STATE*, Tex., 44 S. W. Rep. 509.

57. **CRIMINAL LAW—Disorderly House.**—Where the owner of a house knowingly permits prostitutes, who are inmates, to ply their vocation in the house, he is guilty of the statutory offense of keeping a disorderly house, though there is no actual lease or rental to the inmates.—*STRATTON V. STATE*, Tex., 44 S. W. Rep. 506.

58. **CRIMINAL LAW—Failure of Accused to Testify.**—When the accused does not choose to testify, it is not error on the part of the judge to charge the jury that he is not bound to testify, and that his not having testified must not be construed against him.—*STATE V. JOHNSON*, La., 23 South. Rep. 199.

59. **CRIMINAL LAW—Former Jeopardy.**—Where, on a prosecution for selling liquor without a license, there is evidence of two sales, and the State does not elect on which it will ask a verdict, a conviction is a bar to a subsequent prosecution for either of said sales.—*DESHAZO V. STATE*, Ark., 44 S. W. Rep. 453.

60. **CRIMINAL LAW—Homicide—Self-defense.**—Where the positive evidence of the State was that defendant shot deceased without provocation, and the evidence of defendant that he had to act in self-defense was vague and unsatisfactory, a general charge on self defense, based on the idea that, if deceased made the first assault and demonstration, defendant had the right to slay him, was sufficient, without a special charge, asked by defendant, predicated on the idea, suggested in his testimony, that he went to see deceased on a peaceful mission, and that deceased made at attack on him with a deadly weapon.—*ROLLER V. STATE*, Tex., 44 S. W. Rep. 496.

61. **CRIMINAL LAW—Larceny—Instructions.**—On a prosecution for theft it was harmless to assume in an instruction that defendant took the property, where the only defense was that defendant took it for the purpose of taking care of it for the prosecutor.—*TANNER V. STATE*, Tex., 44 S. W. Rep. 499.

62. **CRIMINAL LAW—Passing Forged Check.**—On a trial for passing a forged check, evidence that defendant, after negotiating the check, redeemed and destroyed it, is admissible, though he knew at the time that he was accused of forgery.—*RILEY V. STATE*, Tex., 44 S. W. Rep. 496.

63. **CRIMINAL LAW—Perjury.**—Pen. Code Cal. § 125, declaring that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false," should be construed with section 118, which provides that every person who, having taken an oath that he will testify truly, "willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury;" and an instruction that defendant is guilty of perjury if he made an unqualified statement which he did not know to be true, without charging that such statement must have been willfully made, erroneous.—*PEOPLE V. VON TIEDEMAN*, Cal. 52 Pac. Rep. 155.

64. **CRIMINAL PRACTICE—False Pretenses.**—Under Rev. St. 1889, § 3564, providing that every person who, with intent to cheat or defraud another, purchases property to be paid for on delivery, and after obtaining possession disposes of the same before paying the

owner, is guilty of a felony, an indictment which charges that "defendant, with felonious intent to cheat and defraud," need not charge that defendant "designedly" obtained possession of the property.—*STATE V. WILSON*, Mo., 44 S. W. Rep. 722.

65. **CRIMINAL PRACTICE—Homicide—Indictment.**—An indictment for murder charging the felonious assault with a deadly weapon, to-wit, a pistol, then and there loaded with gunpowder and leaden balls, and with which defendant shot at, struck and penetrated the deceased, giving him a mortal wound, sufficiently advised defendant of the nature of the charge against him, though it would have been better with the usual allegation, "that, with the leaden balls so shot out of said pistol, the mortal wound was inflicted."—*STATE V. SILK*, Mo., 44 S. W. Rep. 764.

66. **CRIMINAL PRACTICE—Libel.**—An indictment for libel setting out that the publication, which might convey several different meanings, was made with intent to injure prosecutor, and that it was a malicious statement concerning him, which affected his reputation, is insufficient, as it must set forth that it conveyed the idea of one or more of the specific grounds for libel mentioned in Pen. Code 1895, art. 737.—*BYRD V. STATE*, Tex., 44 S. W. Rep. 521.

67. **DECEIT IN SALE OF BANK STOCK—Liability of President and Directors.**—Where the president of a bank sells stock belonging to him, referring to a published statement over his signature as to the condition of the bank, he is liable to the purchaser in an action of deceit if the statement is false, provided the purchaser did not have equal means of knowledge, as he is, unlike a director, conclusively presumed to know the condition of the bank.—*WARD V. TRIMBLE*, Ky., 44 S. W. Rep. 450.

68. **DEDICATION—What Constitutes—Evidence.**—Where a dedication of his property to a public use is relied upon to defeat the claim of one holding the legal title, the acts relied upon to establish such dedication must be such as clearly showed a purpose on the part of the owner to abandon his own personal dominion over such property, and to devote the same to a definite public use.—*SWIFT V. MAYOR, ETC., OF LITHONIA, GA.*, 29 S. E. Rep. 12.

69. **DEDICATION OF STREETS—Evidence.**—Where conduct and circumstances are relied upon as indicating an intention to dedicate land for a public street, facts and circumstances tending to break down the presumption are competent.—*MAYOR, ETC., OF MORRISTOWN V. CAIN*, Tenn., 44 S. W. Rep. 471.

70. **DEED—Cancellation of—Fraud of Grantor.**—After a grantor had assigned a note to indemnify the grantee for possible loss by reason of a mortgage on the land, the makers of the note failed. The grantee, knowing that such failure rendered the note valueless, remained for several months in possession, leased the premises, and endeavored to sell the same, and wrote letters to the grantor, showing that he was satisfied with the purchase: Held, that the grantee could not rescind the deed because of false representations of the grantor as to the value of the note.—*SCOTT V. WALTON*, Oreg., 52 Pac. Rep. 180.

71. **DEEDS—Construction—Life Estates.**—A conveyance of property, reserving a life estate to the grantor, was made to a trustee for the use of any descendants living at grantor's death, and, in default of such, for the use of grantor's heirs, with power, however, to devise the same, or to convey the same by deed, with the assent of the trustee: Held, that the grantor had an equitable life estate, with a contingent remainder to her descendants, if any, and, if none, then to her heirs.—*NUMSEN V. LYON*, Md., 89 Atl. Rep. 533.

72. **DEED—Delivery.**—The recording of a deed which imposes an obligation upon the grantee to assume and pay a pre-existing mortgage is not *prima facie* evidence of its delivery and acceptance.—*KELLOGG V. COOK*, Wash., 52 Pac. Rep. 238.

73. **DEEDS—Execution on Sunday.**—A grantor executing a deed on Sunday to a grantee, not knowing that it

was executed on such day, is bound thereby.—**DUGGAN v. CHAMPLIN**, Miss., 23 South. Rep. 179.

74. **DEED**—Rule in Shelley's Case.—A conveyance to one in trust for a woman and "the heirs of her body," according to the provisions of Civ. Code, § 8086, vests the absolute fee in her, and "the heirs of her body" take no interest under such a conveyance.—**GRIFFIN v. STEWART**, Ga., 29 S. E. Rep. 29.

75. **DESCENT AND DISTRIBUTION**—Community Property.—The rule that one-half of all the property purchased by a husband and wife with community funds descends to the wife's heirs on her death, and that the husband succeeds to only the other half, is a rule of property in the State.—**WARBURTON v. WHITE**, Wash., 52 Pac. Rep. 233.

76. **DESCENT AND DISTRIBUTION**—Rule in Shelley's Case—Statutes.—The two statutes which have been generally enacted in the several States (as illustrated in Code Tenn. §§ 2007, 2008), respectively converting fees tail into fees simple, and abolishing the rule in Shelley's Case, are not inconsistent. The former applies where, by the terms of the instrument conferring the estate, it goes to the person mentioned, and the heirs of his body, while the latter applies where the terms of the instrument purport to create a life estate in the first taker, with remainder to his heirs, or to the heirs of his body.—**DUFFY v. JARVIS**, U. S. C. C., E. D. (Tenn.), 84 Fed. Rep. 731.

77. **DIVORCE**—Statutory Residence.—Where a husband and wife come into the State with intent to make a permanent home, the fact that they spend their winters in New York is not inconsistent with their continued residence in the State, within Gen. St. § 2906, requiring plaintiff in a divorce suit to have "continuously resided in the State three years next before the date of the complaint."—**MOREHOUSE v. MOREHOUSE**, Conn., 39 Atl. Rep. 516.

78. **DIVORCE**—Support of Children.—Under Civ. Code, § 108, providing that in actions for divorce the court may make such order for the care and custody of the children as may seem proper, the court has jurisdiction, on petition filed in the original action for divorce more than 12 years after decree in favor of the wife, and after her remarriage, to make an order for the past and future support of the minor children whose maintenance was not provided for by the decree.—**MCKAY v. SUPERIOR COURT**, Cal., 52 Pac. Rep. 147.

79. **EXECUTION**—Exemption.—A demand for \$200 worth of a stock of goods levied on by attachment, without a selection of the particular goods claimed as exempt, is not sufficient to entitle a debtor to his exemption rights, under Gen. St. 1885, §§ 1866, 1868.—**EISENBERG v. BURCHINELL**, Colo., 52 Pac. Rep. 220.

80. **EASEMENT**—Way of Necessity—Access by Water.—The defendant claimed a right of way by necessity over the plaintiff's land. The defendant's land bordered on the ocean, and over which access to his land could be had: Held, that necessity, and not convenience, is the test of the defendant's claim, there being no evidence that the way by water was unavailable.—**HILDEBETH v. GOOGINS**, Me., 39 Atl. Rep. 530.

81. **ELECTION OF REMEDIES**.—Where the maker of an accommodation note induces the indorsee to believe it was made in the regular course of business, and had been paid to the indorser to whom it was sent for collection, an action against the indorser for money had and received, and execution issued upon judgment therein, is not such an election of remedies as will bar an action against the maker, upon discovery that the note had not been paid.—**BANK OF LODI v. WASHBURN ELECTRIC LIGHT & POWER CO.**, Wis., 74 N. W. Rep. 363.

82. **EMINENT DOMAIN**—Evidence of Value.—In an action for injuries to land caused by the construction of defendant's railroad, a witness acquainted with the land and its market value immediately before and after such construction may testify as to the difference in such value.—**DENISON & P. S. EY. CO. v. SCHOLZ**, Tex., 44 S. W. Rep. 560.

83. **EXECUTION**—Exemptions.—Where an officer levies on property which, up to a certain amount, is exempt, he should make an inventory, and allow the execution defendant to select his exemptions; and, not having done so, he is liable for conversion of the part he sells.—**PARKER v. CANFIELD**, Mich., 74 N. W. Rep. 296.

84. **EVIDENCE**—Parol Evidence.—Parol evidence is admissible to show that a certificate of acknowledgment was executed on a date other than that appearing on the face of it.—**MERRILL v. STYPERT**, Ark., 44 S. W. Rep. 462.

85. **EVIDENCE**—Parol Evidence to Vary Deed.—Parol evidence is inadmissible to show that a deed absolute in form was intended merely to secure a debt.—**MUNFORD v. GREEN'S ADMR.**, Ky., 44 S. W. Rep. 419.

86. **EVIDENCE OF AGENCY**.—While the fact of agency cannot be shown by the declarations of an agent, evidence is competent to show that, in what the agent said and did, he purported to act for defendant, and not for some one else.—**NOWELL v. CHIPMAN**, Mass., 49 N. E. Rep. 631.

87. **FACTORS**—Advancements—Lien.—C, president of the G Co., applied to H & Co., who, as factors, were selling the iron of that company, to let him have money on a note executed by the G Co. to him as receiver of the O Co., which they did, making the check therefor payable to C as receiver: Held that, while the form of the transaction might indicate that the money was advanced to C as receiver, yet as the testimony shows clearly that the money was advanced for the use of the G Co., and was to be paid out of that company's funds, H & Co., are entitled to credit therefor in their account with the G Co.—**LAFFERTY v. HALL BROS. & CO.**, Ky., 44 S. W. Rep. 426.

88. **FALSE IMPRISONMENT**—Pleading.—In an action against road officers for arresting plaintiff for resisting the opening of a road, where the complaint alleges that defendants acted "maliciously and without justifiable" cause, and without authority, defendants may show under the general issue their official character, and all the facts attending the transaction, not as a complete defense, but to prevent a recovery of more than actual damages, though such evidence tends to prove a full justification of the arrest.—**RICHARDSON v. HUSTON**, S. Dak., 74 N. W. Rep. 234.

89. **FEDERAL COURTS**—Copyright Suits.—A suit which, though charging infringement, and praying an injunction and account, is in reality merely a suit to enforce a contract between author and publisher, is not a case arising under the copyright laws, so as to be within the jurisdiction of the federal courts.—**SILVER v. HOLT**, U. S. C. C., D. (Mass.), 84 Fed. Rep. 809.

90. **FEDERAL COURTS**—Jurisdiction—Receivers.—Where a railroad company has passed into the hands of receivers appointed by a federal court, under an order that the receivers are "fully authorized and instructed to continue the operation as heretofore of the several features of the relief department of said defendant," a member complaining of the operation of such department must seek relief by direct application to the appointing court, or by appeal from the order; the State courts having no jurisdiction to supervise the conduct of the receivers.—**BALTIMORE & O. R. CO. v. FLAHERTY**, Md., 39 Atl. Rep. 524.

91. **FEDERAL COURTS**—Jurisdiction.—A suit by property owners to enjoin city officials from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the State constitution, cannot be maintained in a federal court, on the theory that the assessment of taxes, etc., by the city, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue in such case is whether the statute enlarging the corporate limits is invalid under the State constitution, and no federal question is involved.—**MCCAIN v. CITY OF DES MOINES**, U. S. C. C., S. D. (Iowa), 84 Fed. Rep. 726.

92. **FORCIBLE ENTRY AND DETAINER**—When Maintained.—A mortgagor in possession, after default under a mortgage giving the mortgagee a right of entry on breach of the condition, is not the mortgagee's tenant, in such sense as to enable the latter to maintain a summary action of forcible entry and detainer, under Rev. St. D. C. § 681. This statute applies only in cases where the conventional relation of landlord and tenant exists, or has existed, between the parties. —*WILLIS V. EASTERN TRUST & BANKING CO.*, U. S. S. C., 18 S. C. Rep. 347.

93. **FRAUDS, STATUTE OF**—Contract Relating to Land.—Where, pending suit between a city and joint owners of land as to boundaries, a proposition was made by one joint owner to the other that, on payment of a certain sum, he would agree to the location of the line, and give an option as to the selection of lots on partition, the contract was not one for partition alone, and was within the statute of frauds, unless in writing. —*ZANDERSON V. SULLIVAN*, Tex., 44 S. W. Rep. 484.

94. **FRAUDS, STATUTE OF**—Sale of Goods.—An oral contract whereby a dealer agreed to furnish, at a price exceeding \$50, bottles of specified sizes, and made of a kind of glass used only by a certain manufacturer and according to his models, is a contract for the sale of goods, within the meaning of the statute of frauds (Pub. St. ch. 78, § 5), and not one to furnish labor and materials. —*SMALLEY V. HAMBLIN*, Mass., 49 N. E. Rep. 626.

95. **FRAUDULENT CONVEYANCES**—Action against Receivers.—Where, after creditors of defendant had sued him, he, being insolvent, conveyed lands to a corporation formed by him, with intent to defraud the plaintiffs in the collection of their demands, a judgment setting aside the conveyance, and declaring the executions valid liens on the land, will not be disturbed. —*CASS V. SUTHERLAND*, Wis., 74 N. W. Rep. 337.

96. **FRAUDULENT CONVEYANCES**—Burden of Proof.—Where the trustee under a mortgage given by an insolvent debtor for the benefit of certain creditors sells the property, and an unpreferred creditor garnishes the purchaser on the ground that the mortgage is in fraud of creditors, the burden is on such creditor to show fraud, and not on the purchaser to show the validity of the instrument, the mortgage being valid on its face, and no fraudulent circumstances having been shown. —*KOSMINSKY V. WALTER*, Tex., 44 S. W. Rep. 540.

97. **FRAUDULENT CONVEYANCES**—Collusion.—In an issue between an intervening purchaser and an attaching creditor, where there had been no change of possession, and the vendor had continued to conduct the business in the same manner as prior to the alleged sale, a witness could testify that the vendor had told him that he was pressed, and made the bill of sale in question to protect himself and those who had worked for him, as such testimony was harmless if it did not tend to show fraud, and, if it did, the jury had the right to consider it, in order to determine whether the vendee participated therein. —*ANDERSON V. WHITE*, Wash., 52 Pac. Rep. 231.

98. **FRAUDULENT CONVEYANCES**—Consideration.—A creditor of one of the members of a firm, though the wife of such member, and though her claim arose after the insolvency of the firm, can hold, as against a firm creditor having no lien, a note originally belonging to the firm, but which, in a division of the firm notes among the partners, was assigned to her husband, it having been given her in payment of her debt and being fairly worth no more than it, and being given her for the sole purpose of paying her. —*BONDS V. EAGLE & PHOENIX MFG. CO.*, Tex., 44 S. W. Rep. 539.

99. **FRAUDULENT CONVEYANCES**—Consideration.—Conveyances made for an adequate valuable consideration, without knowledge by the grantees of the grantor's insolvency, should not be set aside as in fraud of creditors. —*TENNENT-STIBLING SHOE CO. V. DAVE*, Miss., 23 South. Rep. 188.

100. **FRAUDULENT CONVEYANCES**—Consideration.—In an action to foreclose a firm mortgage, the question whether money to secure which a prior mortgage had been given, was actually loaned to the firm, is material, as such mortgage, if given without consideration, would be a fraud on creditors. —*WILLIAMS V. BAKER*, Mich., 74 N. W. Rep. 306.

101. **FRAUDULENT CONVEYANCES**—Husband to Wife.—A deed by a husband to his wife to land that had been in his name for four years, in payment of a loan made eight years previously, gives her an equity in the land superior to that of his other creditors. —*PARKER V. BARKENOWITZ*, Mich., 74 N. W. Rep. 290.

102. **GARNISHMENT**—Judgment Debt.—A judgment debt is not subject to garnishment by process from a court other than that in which the judgment was rendered. —*HAMILL V. PECK*, Colo., 52 Pac. Rep. 216.

103. **GARNISHMENT**—Notes.—Promissory notes are not subject to garnishment until after maturity. —*SERVIS V. WASHTEWAW CIRCUIT JUDGE*, Mich., 74 N. W. Rep. 310.

104. **GUARANTY**—Notice of Acceptance.—In August, 1893, defendant wrote a letter to plaintiff, offering to guaranty the price of liquors sent to S, who had told defendant about the liquors he expected to purchase, and that he had proposed defendant as security. Plaintiff sent the liquors to S, who was running a saloon owned by defendant, and in May, 1894, defendant wrote that he would not be responsible for more goods: Held, sufficient evidence that defendant had notice that his guaranty was accepted to justify the submission of the question to the jury. —*FRIEDMAN V. PETERS*, Tex., 44 S. W. Rep. 572.

105. **HIGHWAYS**—Establishment.—The laying out of a road by a town board of supervisors is not a taking of the land covered thereby, until it is opened by order of the supervisors; and until that time the owner can use the land the same as before the road was laid out. —*KELLER V. EARL*, Wis., 74 N. W. Rep. 384.

106. **HOMESTEAD**—Selection—Waiver.—Under Const. 1874, and statutes providing how the homestead exemption may be selected, the failure to claim a homestead before the land constituting it is condemned to be sold to pay a debt, is no waiver of such claim. —*BUNCH V. KEITH*, Ark., 44 S. W. Rep. 452.

107. **HOMESTEAD**—What Constitutes Family.—A widower who has living with him a married daughter whose husband is not legally or actually separated from her, although he is away from her most of the time, and contributes very little towards her support, is not a housekeeper with a family, within the meaning of the homestead law. —*LOUISVILLE BANKING CO. V. ANDERSON*, Ky., 44 S. W. Rep. 636.

108. **HUSBAND AND WIFE**—Community Estate—Vendor and Purchaser.—A sale under a judgment on a note given by a husband for the price of land purchased by him passes whatever community interest the wife has in the land. —*CULMORE V. MEDLENKA*, Tex., 44 S. W. Rep. 676.

109. **HUSBAND AND WIFE**—Joint Liability for Debt of Wife.—Under *Sanb. & B. Ann. St.* § 2608, providing that, "where a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property or business she may sue or be sued alone," it was error to permit plaintiff to dismiss, as against the husband, in an action against a married woman and her husband to recover for money loaned the wife, who had no separate property or business. —*GALLAGHER V. MJELDE*, Wis., 74 N. W. Rep. 240.

110. **INJUNCTION**—Collection of Fee Bill.—A court of equity will not enjoin the collection of a fee bill where all the legal costs therein taxed have not been paid or tendered. —*CITIZENS' NAT. BANK V. GREGG*, Neb., 74 N. W. Rep. 273.

111. **INSOLVENCY**—Allowance of Claims—Dividends.—When the holder of a bill or note applies to prove his claim against the estate of an insolvent surety, or one occupying the position of a surety, any sum actually received in payment from the principal debtor must

be deducted from the amount to be proved. The sum actually remaining unpaid must be the basis on which the dividend is to be computed. —*IN RE RECEIVERSHIP OF SECURITY BANK OF DULUTH*, Minn., 74 N. W. Rep. 287.

112. **INSOLVENCY—Expenses of Administration.**—It is a general principle that a trust estate must bear the expense of its administration. It is also established, by sufficient authority, that where one of many parties, having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction, and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportionate contribution from those who accept the benefit of his efforts. —*SWEDISH-AMERICAN NAT. BANK V. DAVIS*, Minn., 74 N. W. Rep. 286.

113. **INSURANCE—Anti-Mortgage Clause—Waiver.**—Where an insurance company waives a written application, and issues a policy based on its personal knowledge of the property, and receives the premium therefor, it thereby waives an anti-mortgage clause of which insured had no knowledge until after the loss. —*GEORGIA HOME INS. CO. V. HOLMES*, Miss., 23 South. Rep. 183.

114. **INSURANCE—Application—Misrepresentations.**—A misrepresentation as to the occupancy of a building, at the date of a fire insurance policy, is waived by the company if its agent, not being in collusion with the insured, knows the real fact as to its occupancy. —*FIRE ASSN. OF PHILADELPHIA V. BYNUM*, Tex., 44 S. W. Rep. 579.

115. **INSURANCE—Conditions—Authority.**—It seems that the authority of an insurance agent to waive the payment of the premium in cash, and give the insured credit therefor, may be inferred from the fact that the agent is authorized to negotiate contracts of insurance, to fill out and deliver insurance policies executed in blank and left with him for that purpose, and to receive and receipt for insurance premiums, and to make settlements from time to time with his principal for premiums collected. —*SLOBODISKY V. PHENIX INS. CO. OF BROOKLYN*, Neb., 74 N. W. Rep. 270.

116. **INSURANCE—Construction of Policy—Conditions.**—The condition in a fire policy issued on a stock of merchandise, prohibiting fireworks to be kept, was not waived by an examination of insured's books by the company after knowledge that fireworks were kept in the store, where the policy provided that, in case of loss, the company could examine the books, and that such examination should not be a waiver of any conditions. —*PHOENIX INS. CO. V. FLEMING*, Ark., 44 S. W. Rep. 464.

117. **INTOXICATING LIQUORS—Illegal Sales.**—Where an information charges an illegal sale of liquors to a particular person, it is insufficient to authorize a conviction to show a sale to some other person. —*FOX V. STATE*, Tex., 44 S. W. Rep. 498.

118. **INTOXICATING LIQUORS—Sales—Agency.**—Merely buying whisky for another, whose money is used in making the purchase, does not, "as matter of law," constitute the person so doing the agent of both the seller and the buyer. —*EVANS V. STATE*, Ga., 29 S. E. Rep. 40.

119. **JUDGMENT AGAINST TORT FEASORS—Res Judicata.**—A verdict for nominal damages, and a judgment *non pros.* entered thereon, in an action against contractors for breach of contract, and negligence in the construction of a building, is a bar to a recovery for the same negligence in an action against the supervising architect, wherein the damages are alleged to have been caused by the failure of the architects to properly supervise the work, provided the judgment has been paid, or the amount thereof properly tendered. —*BARKLEY V. WILSON*, Md., 39 Atl. Rep. 502.

120. **JUDGMENT BY DEFAULT.**—A judgment by default will not be opened on the ground of excusable neglect based on the fact that defendants changed their post office, and did not receive the answer which their counsel sent them until 11 months after it was mailed,

where they did not inquire at their former post office for letters, and did not communicate with their counsel until 11 months after the time for answering had expired. —*VICK V. BAKER*, N. Car., 29 S. E. Rep. 64.

121. **JUDGMENT—Jurisdiction—Affidavit of Illegality.**—Jurisdiction to render a judgment may be acquired by serving the defendant with the process of the court in which the case is pending, by his appearing in person and pleading, or by the appearance of some one authorized by the defendant who does so appear and plead for him; hence, when a judgment is attacked by affidavit of illegality, alleging want of jurisdiction of the person of the defendant, because he had not been served, and had neither appeared and pleaded, nor authorized another to do so for him, it is incumbent on him, in order to sustain his illegality, to prove affirmatively the truth of all these allegations. —*LE MASTER V. ORR*, Ga., 29 S. E. Rep. 82.

122. **JUDGMENT—Record—Foreign Judgment.**—Where the record of a foreign judgment does not show service of process, or an appearance by the defendant against whom suit is brought on said judgment in another State, such record is inadmissible. —*CUNNINGHAM V. SPOKANE HYDRAULIC CO.*, Wash., 52 Pac. Rep. 235.

123. **JUDGMENT—Validity.**—A judgment rendered by the court of civil appeals against a surety on an appeal bond, who had been released by appellant's alteration of the bond, was not absolutely void, since the court had jurisdiction. —*ROWLETT V. WILLIAMSON*, Tex., 44 S. W. Rep. 679.

124. **JUDGMENT—Validity—Collateral Attack.**—In an action against a married woman engaged in business, for goods sold, there was nothing in the pleadings to apprise the court that she was a married woman. She was cited to appear, and, failing to do so, judgment was rendered against her by default: Held, that the judgment was in effect as if rendered against a *feme sole*, and was not void. —*FOCKE V. STERLING*, Tex., 44 S. W. Rep. 611.

125. **JUDICIAL NOTICE.**—While the court may take judicial notice of the relative locations of the towns of the State, it cannot take notice of the presence or absence of banks in a town. —*BARTHOLOMEW V. FIRST NAT. BANK OF EVERETT*, Wash., 52 Pac. Rep. 239.

126. **JUDICIAL SALES—Pendency of Other Litigation.**—Where a large manufacturing plant is lying idle, and rapidly deteriorating in the hands of a receiver, the mere fact that litigation is pending in another court, involving the title to the land on which the plant is situated, is not an insuperable objection to ordering a sale, if the court, in its best judgment, believes that the interest of the creditors will be best conserved thereby. Nor is it any ground of objection to confirmation of such a sale that the commissioners gave notice at the time of sale of the pendency of such suit, with the honest purpose of informing bidders as to the condition of the title. —*FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. V. ROANOKE IRON CO.*, U. S. C. C., W. D. (Va.), 84 Fed. Rep. 754.

127. **LANDLORD AND TENANT—Lease to Alien.**—A lease of land for 99 years to an alien who has not declared his intention to become a citizen contravenes Const. art. 2, § 83, which prohibits the ownership of lands by such aliens (with certain exceptions), and declares all conveyances of lands to any alien directly or in trust to be void. —*STATE V. MORRISON*, Wash., 52 Pac. Rep. 228.

128. **LANDLORD AND TENANT—Lien.**—Under Rev. St. 1895, arts. 3235, 3251, giving to persons leasing lands or tenements a lien on crops raised thereon, and on property furnished by the landlord to the tenant, and to persons leasing a residence, storehouse, or other building a lien on the property of the tenant therein, a lessor of a vacant lot has no lien for unpaid rent on improvements erected thereon by the lessee. —*MEYER V. O'DELL*, Tex., 44 S. W. Rep. 545.

129. **LIBEL—Evidence—Malice.**—In an action for libel for publishing an article to the effect that in an action

for divorce brought against plaintiff by his wife "such incidents as the hurling of dishes at his wife, when engaged in argument, were referred to by witnesses for the prosecution," the gist of the libel charged is a violent assault by plaintiff upon his wife, and evidence that at the trial of the divorce case the wife testified that her husband committed assaults upon her with other weapons than charged in the article was admissible.—*HEARNE v. DE YOUNG*, Cal., 52 Pac. Rep. 150.

130. **LIBEL**—Pleading—Colloquium.—In order to render words actionable in a suit for libel, it is not necessary that there should be the same precision and certainty in the language employed to make the charge as in the allegations of an indictment for the same offense.—*THOMPSON v. LEWISTON DAILY SUN PUB. CO.*, Me., 39 Atl. Rep. 556.

131. **LIEN**—Contingent Remainder-men.—One who has created a lien on land cannot, by subsequently creating a contingent remainder, postpone the right of the lienholder to foreclose his lien until the death of the life tenant, and the ascertainment of the contingent remainder-men; a judgment against the life tenant in possession, or at least against him and the contingent remainder-men in existence, being sufficient to bar all the contingent remainder-men.—*R. A. ROBINSON'S SONS v. COLUMBIA FINANCE & TRUST CO.*, Ky., 44 S. W. Rep. 681.

132. **LIFE INSURANCE**—Insurable Interest.—Where a policy is payable to the personal representative of the insured, the fact that the premiums are paid by one who has no insurable interest, under the belief that the insurance is for his benefit, does not render the policy void.—*PRUDENTIAL INS. CO. OF AMERICA v. CUMMINS' ADMR.*, Ky., 44 S. W. Rep. 431.

133. **LIMITATIONS**.—Where plaintiff in replevin, by a supplemental petition stating a new cause of action, asserts a different title to a piano which has been in the adverse possession of defendant for over two years than that set out in the original complaint, limitations run against him until the filing of the supplemental petition.—*ESTREY v. FISHER*, Tex., 44 S. W. Rep. 555.

134. **LIMITATIONS**—Permanent Injury to Land.—Limitations begin to run from completion of railroad against action for the backing of water and sobbing of plaintiff's land caused by such construction, the land having ever since the construction been sobbed with backwater.—*HARRELL v. NORFOLK & C. R. CO.*, N. Car., 29 S. E. Rep. 56.

135. **MASTER AND SERVANT**—Defective Appliances—Negligence.—A charge that a railroad company is bound to use ordinary care to furnish suitable machinery and proper and reasonably safe appliances for the discharge of an employee's duty, and to keep them in proper repair, does not make it the absolute duty of the company to provide safe appliances, and keep them in proper repair, instead of requiring it to use ordinary care in that respect.—*TEXAS & N. O. R. CO. v. BLACK*, Tex., 44 S. W. Rep. 673.

136. **MASTER AND SERVANT**—Personal Injuries—Damages—Release.—The acceptance of benefits, under an agreement between a railroad company and an employee that such acceptance from their voluntary relief department shall release the company from all claims for damages arising from injury or death, does not constitute an election between remedies, or a compromise and settlement, but the agreement is a release, within Rev. St. 1894, § 7067 (Employers' Liability Act), which invalidates contracts releasing corporations from future liability for injuries to their servants.—*PITTSBURG, C. & ST. L. RY. CO. v. MONTGOMERY*, Ind., 49 N. E. Rep. 582.

137. **MASTER AND SERVANT**—Negligence—Incompetent Fellow-servant.—That the employment of an incompetent servant does not render the master liable to a fellow-servant for an injury to him caused by some negligent act of such incompetent servant, unless the injury is the result of such incompetence. If the injury be the result of a mere act of negligence of the incompetent servant, it comes within the rule that the master

is not liable to an employee for an injury caused by the negligence of a co-employee in the same business.—*KLIEFOTH v. NORTHWESTERN IRON CO.*, Wis., 74 N. W. Rep. 356.

138. **MECHANICS' LIENS**—Unused Materials.—Where one furnishes a contractor with doors, windows and locks for a building, the value of those remaining after the building is completed cannot become a charge against the property, under Hill's Ann. Laws, § 3660, making such contractor the agent of the owner for the purpose of giving a lien on a building for materials furnished, at the instance of the owner, to be used in the construction thereof.—*FITCH v. HOWITT*, Oreg., 52 Pac. Rep. 192.

139. **MECHANICS' LIEN**—Apportionment of Liens.—A contract for painting seven buildings showed that the work on each building ranged from \$544.18 to \$322.76. Four of the lots fronted east, on which were four buildings, joined by partition walls, but not under the same roof. Immediately west of such lots was a private alley, and west of it were the other three lots, fronting north, with three buildings thereon, joined by partition walls, but not under the same roof: Held, that each of the houses and lots must be treated as a separate piece of property, and the contractors were not entitled to a single lien against all.—*BUCKLEY v. COMMERCIAL NAT. BANK OF CHICAGO*, Ill., 49 N. E. Rep. 617.

140. **MECHANICS' LIENS**—Knowledge of Owner.—One seeking to foreclose a mechanic's lien under Hill's Ann. Laws, § 3672, giving a lien where repairs are made to the knowledge of the owner, not posting notices, must allege such knowledge.—*HUNTER v. CORDON*, Oreg., 52 Pac. Rep. 182.

141. **MECHANICS' LIENS**—Mortgages.—The lien of a mortgage, taken while a building is in process of erection on the land mortgaged, is subject to mechanics' liens for work commenced or material the furnishing of which was begun before the mortgage was recorded.—*GOODWIN v. CUNNINGHAM*, Neb., 74 N. W. Rep. 315.

142. **MECHANIC'S LIEN**—Premature Filing.—Under Code Civ. Proc. § 1187, requiring every person, save an original contractor, claiming a mechanic's lien, to file his claim therefor within 30 days after completion of any building or improvement, a claim filed by one not an original contractor, within 30 days after work has ceased on an unfinished building, is prematurely filed, where it appears that the building has not been abandoned by the owner.—*MARCHANT v. HAYES*, Cal., 32 Pac. Rep. 154.

143. **MORTGAGES**—Attorney's Fee.—Under Code Proc. § 803, providing that in all judgments on notes and similar instruments in writing an attorney fee may be allowed in the amount specially contracted to be paid by the terms of the note or mortgage, the amount fixed as such fee in a mortgage must be regarded as stipulated damages, and enforced accordingly.—*SCHOLTY v. DE MATOS*, Wash., 52 Pac. Rep. 242.

144. **MORTGAGES**—Foreclosure.—Separate, independent agreements, of which no one knows anything save the creditor and the debtor, cannot affect third persons, and cannot be taken as an absolute basis for prescription.—*BOAGNI v. WARTELE*, La., 23 South. Rep. 206.

145. **MORTGAGES**—Foreclosure—Sale.—It is not a good objection to the confirmation of a sale of real estate, made under a decree of foreclosure, that the notice of sale did not accurately state the sum for the satisfaction of which the land would be sold.—*AMOSKEAG SAV. BANK v. ROBBINS*, Neb., 74 N. W. Rep. 261.

146. **MORTGAGE BY CORPORATION**—Where no other sufficient authority is shown, an officer of a corporation cannot execute a mortgage of its property, except under the authority of its board of directors.—*MASON & FORD CO. v. METCALFE MFG. CO.*, Ky., 44 S. W. Rep. 629.

147. **MORTGAGE FORECLOSURES**—Pleading—Limitation of Actions.—One who is made a defendant in foreclosure merely because he claims some interest in the

mortgage property, without any allegation in the bill that he owes any part of the debt, or is in possession of any part of the property, or has the legal title thereto, cannot, by demurrer, set up the defense of the statute of limitations.—*BLAIR v. SILVER PEAK MINES*, U. S. C. C., D. (Nev.), 84 Fed. Rep. 787.

148. **MORTGAGE ON CROPS**—Validity.—An oral contract to raise crops on shares, in consideration of the tenant having title to one-half thereof, being good for one year only, a mortgage made by him during the first year of his share of the next year's crop is invalid.—*BROWN v. BOLT*, Mich., 74 N. W. Rep. 295.

149. **MUNICIPAL CORPORATIONS**—Contracting Debts.—Under a provision of the city charter that it shall be unlawful to order to be issued or to issue any warrant on the city treasurer for the payment of money, or to contract any debt unless there is "in the hands of the treasurer at said time, and that may be properly applied to the payment of said warrant, a sufficient amount of money to pay the same," the city is prohibited from contracting any debt or liability unless the city treasurer has at the time sufficient money to pay the same.—*CITY OF GREENVILLE v. LAURENT*, Miss., 28 South. Rep. 185.

150. **MUNICIPAL CORPORATIONS**—Defective Sidewalks—Injuries.—Where one passes along a sidewalk, which is in a dangerous condition, in an ordinarily prudent manner, and is injured, she can recover therefor against the city, although she knew at the time that the sidewalk was dangerous.—*CHILTON v. CITY OF ST. JOSEPH*, Mo., 44 S. W. Rep. 766.

151. **MUNICIPAL CORPORATIONS**—Deposit in Bank.—Const. art. 11, § 14, which makes it a felony for any officer having the possession or control of any public money to make a profit out of it, or use it for any purpose not authorized by law, does not apply to the depositing of a city's funds in a bank for safe-keeping, subject to repayment on demand.—*BARDSLEY v. STERNBERG*, Wash., 52 Pac. Rep. 251.

152. **MUNICIPAL CORPORATIONS**—Injury to Employee.—A city is not liable for an injury to a laborer engaged in working on a street because it had caused a different person to direct the work than the officer on whom such duty was imposed by law.—*TAGGART v. CITY OF FALL RIVER*, Mass., 49 N. E. Rep. 622.

153. **MUNICIPAL CORPORATIONS**—Limitation of Indebtedness.—Where the indebtedness of a city at the time of the adoption of the constitution exceeding the limit prescribed by section 158, it matters not how great the excess, the city may, so long as the indebtedness has never been reduced below the limit prescribed, increase its indebtedness to the extent of 2 per centum on the value of the taxable property in the city; but any increase since the adoption of the constitution is to be estimated in determining whether a further increase will exceed the 2 per centum limit.—*CITY OF ANGLAND v. CULBERTSON*, Ky., 44 S. W. Rep. 441.

154. **MUNICIPAL CORPORATIONS**—Personal Injuries—Complaint.—A complaint which alleges that plaintiff was injured by a common firecracker thrown by some one in a crowd of 30 or more people engaged in exploding fireworks, on the evening of July 4th, does not state a cause of action, under *Samb. & B. Ann. St. § 988*, which gives a remedy against the city for any injury sustained, in consequence of any mob or riot, by any person not implicated therein.—*ARON v. CITY OF WAUSAU*, Wis., 74 N. W. Rep. 854.

155. **MUNICIPAL CORPORATIONS**—Powers.—While a municipal corporation may lawfully do such things as are necessarily incident to the proper discharge of its public functions, it is not, as a general rule, within the power of such a corporation to engage in an occupation or business such as is usually pursued by private persons.—*KERN v. MAYOR, ETC. OF CITY OF WAYCROSS*, Ga., 29 S. E. Rep. 42.

156. **MUNICIPAL CORPORATIONS**—Special Assessments—Equitable Assignments.—Plaintiff paved a street for a city, and was paid by certificates against abutting

property owners, among whom was included a street railroad company, which was liable, under its contract with the city, for paving between its rails, and for six inches outside thereof, but not as an abutting owner: Held, that the claim against the railroad company was equitably assigned.—*HOUSTON CITY ST. RY. CO. v. STORRIE*, Tex., 44 S. W. Rep. 693.

157. **MUTUAL BENEFIT INSURANCE**—By laws—Validity.—The valid passage of a by-law by the supreme lodge of an insurance company, in a mode not prohibited by its charter or by the general law of the land, is a repeal of any other mode previously prescribed by the same lodge.—*DORNE v. SUP. LODGE, KNIGHTS OF PYTHIAS OF THE WORLD*, Miss., 23 South. Rep. 191.

158. **NATIONAL BANK**—Assessment of Stock—Federal Jurisdiction.—When an executor refuses to recognize, as a claim against decedent's estate, an assessment by the comptroller of the currency upon national bank stock belonging to the deceased, a federal court will assume jurisdiction of an action against the executor to determine the liability, although the estate is in the course of administration in the probate court.—*ZIMMERMAN v. CARPENTER*, U. S. C. C., D. (S. Dak.), 84 Fed. Rep. 747.

159. **NEGLIGENCE**—Dangerous Premises—Injuries to Licensee.—A fireman employed at a building where defendants, through subcontractors, were erecting a stairway, finding his usual route to the engine house blocked, started to go over the stairway. One of the steps was without a tread, and he stepped through the opening, and was injured. The accident happened in the nighttime, and the fireman had a lantern. The opening was plainly visible in the daytime: Held that, the fireman being a mere licensee, defendants were not liable.—*BLACKSTONE v. CHELMSFORD FOUNDRY CO.*, Mass., 49 N. E. Rep. 635.

160. **NEGLIGENCE**—Exhibition—Defective Guard Rails.—One who maintains a hall for public exhibitions is liable for injuries sustained by a spectator at a polo game, caused by the giving way of the guard rail in front of the gallery of the hall, there being evidence that the rail was insufficient to bear the weight of the persons accustomed to lean upon it, and that plaintiff had no notice that the rail was defective, and acted as all other persons in the gallery near the rail had been accustomed to act under similar circumstances, with defendant's knowledge.—*SCHOFIELD v. WOOD*, Mass., 49 N. E. Rep. 636.

161. **NEW TRIAL**—Payment of Costs.—Where defendant's motion for a new trial is granted on the express condition that he pay plaintiff's cost in the action, together with the cost of the motion, by accepting such costs plaintiff is estopped from objecting to the granting of such new trial.—*COOK v. MCCOMB*, Wis., 74 N. W. Rep. 353.

162. **NOVATION**—Statute of Frauds.—Novation, in the law of contracts, implies the substitution of a debtor, of a creditor, and of a new contract. It is never presumed, but must always be proved.—*HAMLIN v. DRUMMOND*, Me., 39 Atl. Rep. 551.

163. **NUISANCE**—Damages.—An instruction that a defendant charged with maintaining a nuisance is liable only for his own acts, and not by reason of a condition of other property adjacent to plaintiff's property, is proper, in the absence of a request to make it more clear, where there was evidence that such other property was kept in an offensive condition.—*BRENNAN v. CORNICANA COTTON-OIL CO.*, Tex., 44 S. W. Rep. 688.

164. **NUISANCE**—Injunction—Street Railway.—Equity will not enjoin a public nuisance on the application of an individual, either in his own behalf, or in behalf of himself and others of like interest who either do or do not join in the application, unless some special damage to the individual, not suffered in common with the public generally, has been sustained.—*TAYLOR v. PORTSMOUTH, K. & Y. ST. RY.*, Me., 39 Atl. Rep. 560.

165. **OFFICERS**—Fees—Penal Statutes.—Article 5, § 24, of the constitution, providing that the officers of the

executive department "shall not receive to their own use any fees, costs, interest upon public moneys in their hands, or under their control, perquisites of office or other compensation, and all fees that may hereafter be payable by law for services performed by an officer, provided for in this article of the constitution, shall be paid in advance into the State treasury," not only prohibits such officers from receiving fees to their own use, but also prohibits all executive officers except the treasurer from receiving fees at all, and requires their payment in advance into the treasury by persons by whom they are payable.—*MOORE v. STATE*, Neb., 74 N. W. Rep. 319.

166. **OFFICERS—Power of Removal—Injunction.**—The courts have no jurisdiction to enjoin a postmaster from removing an assistant postmaster who claims protection under the civil service law.—*COUPER v. SMYTH*, U. S. C. C., N. D. (Ga.), 84 Fed. Rep. 767.

167. **PARTNERSHIP—Insolvency—Mortgages.**—Where an insolvent firm has given a mortgage to another firm, having a common partner, to secure a valid indebtedness, unsecured creditors of the insolvent firm cannot maintain a bill to require the receiver in the foreclosure proceedings to account for the portion of the proceeds of the mortgaged property in his hands to which such partner is entitled as a member of the creditor firm.—*BURROWS v. LEECH*, Mich., 74 N. W. Rep. 296.

168. **PARTNERSHIP—Interest on Advances.**—During the continuance of a partnership, one partner cannot, without an agreement, charge another with interest on money advanced to the firm, and used in its business.—*SIEBERT'S ASSIGNEE v. RAGSDALE*, Ky., 44 S. W. Rep. 653.

169. **PAYMENT TO AGENT—Evidence of Authority.**—A party who pays money to another, to be applied on a note which such person has not in his possession, assumes the burden of showing the authority of such person to receive payment.—*CHANDLER v. PYOTT*, Neb., 74 N. W. Rep. 263.

170. **PLEADING—Amendment.**—On a second trial, a party will not be permitted to amend his pleading, made with knowledge of all the facts, so as to deny facts which he had previously alleged, and upon which an opinion on appeal had been based.—*LILLY v. MENKE*, Mo., 44 S. W. Rep. 730.

171. **PLEADING—Cross Complaint—Waiver.**—Where defendant files a cross complaint demanding affirmative relief, he waives the question of jurisdiction as effectually as though he had appeared generally in the first instance.—*CHANDLER v. CITIZENS' NAT. BANK OF EVANSVILLE*, Ind., 49 N. E. Rep. 579.

172. **PLEADING—Written Instrument.**—When the execution of a written instrument is admitted by the pleadings, its legal effect must, of necessity, follow; and what its legal effect is is purely a question of law for the court to determine. But this does not prevent the defendants from impeaching said contract for fraud, accident, or mistake in the execution thereof.—*WESTERVELT v. JONES*, Kan., 52 Pac. Rep. 194.

173. **PLEDGE—Negligence of Pledgee.**—Where a creditor accepts a transfer of sheep as collateral security, under an agreement to sell them, and retain out of the proceeds the amount of his claim, carelessness of the pledgee in keeping, and failing to sell, the sheep until after the market had fallen, and in not properly caring for them, constitutes a ground of counterclaim in an action to recover the debt.—*ANDERSON v. CAROTHERS*, Wash., 52 Pac. Rep. 229.

174. **PLEADING—Uniting Legal and Equitable Actions.**—Seeking recovery under one complaint against a corporation for goods sold and delivered to it, and against an individual alleged to have an interest in its business, and the full control, management, and disposition of its property and assets, is an improper joinder of legal and equitable causes of action, and will not be permitted in the federal courts, though allowable in the courts of the State where the action was brought.

—*COIT & CO. v. SULLIVAN-KELLY CO.*, U. S. C. C., N. D. (Cal.), 84 Fed. Rep. 724.

175. **PRINCIPAL AND SURETY—Public Building—Contractor's Bond.**—A bond for the protection of persons furnishing labor or material for the erection of a public building, under the laws of the State of Iowa, does not become a binding obligation until accepted and approved by the officer charged by law with that duty.—*UNITED STATES WIND ENGINE & PUMP CO. v. DREXEL*, Neb., 74 N. W. Rep. 317.

176. **PROCESS—Affidavit for Publication.**—An affidavit for publication of summons, which states that the defendant "cannot after due diligence, be found within the State," and that defendants are not residents of the State, without stating the facts showing what efforts to find the defendants have been made, is insufficient.—*BOTHELL v. HOELLWARTH*, S. Dak., 74 N. W. Rep. 281.

177. **PROCESS—Summons—Waiving Defect.**—Right to set aside a summons for irregularity is waived by answering, and participating in the trial.—*WILLIAMS v. GARVIN*, S. Car., 29 S. E. Rep. 1.

178. **PROMISSORY NOTES—Want of Consideration.**—A want or failure of consideration may always be shown in defense of a suit on a note.—*KELLEY v. GUT*, Mich., 74 N. W. Rep. 291.

179. **QUO WARRANTO—Usurping Corporate Powers.**—An action of *quo warranto* for usurping the powers of a corporation is properly brought against the officers of such corporation as individuals.—*STATE v. FLEMING*, Mo., 44 S. W. Rep. 758.

180. **RAILROADS—Condemnation—Measure of Damages.**—A railroad company, seeking to condemn land after it had appropriated it under a claim of right, must pay the value at the time of the trial, and not the value when the road was constructed.—*SAN ANTONIO & A. P. RY. CO. v. HUNNICUTT*, Tex., 44 S. W. Rep. 535.

181. **RAILROAD COMPANIES—Crossing Accidents—Contributory Negligence.**—A traveler on a street or public highway, approaching a railroad crossing thereof for the purpose of using it or going over, must exercise ordinary care, or such care as would be exercised by a prudent man under all the facts and circumstances attendant upon and surrounding his approach to and crossing the track.—*CHICAGO, B. & Q. R. CO. v. HOLLAND*, Neb., 74 N. W. Rep. 331.

182. **RAILROAD COMPANY—Drunken Passenger—Ejection.**—Plaintiff's intestate, on defendant's train, was helpless from intoxication, and he had no ticket, and tendered no fare. Defendant put him off at a depot where three passengers got off, and where there were two hotel porters. Afterwards he wandered on the track, and was run over by an engine, and killed; Held, that defendant was not liable.—*BROWN'S ADMR. v. LOUISVILLE & N. R. CO.*, Ky., 44 S. W. Rep. 648.

183. **RAILROAD COMPANY—Duty to Trespassers on Track.**—Where the trainmen see a trespasser on the track in front of the train, it is their duty to give timely warning of the danger, and, if necessary and practicable, to slacken speed and stop the train.—*LOUISVILLE & N. R. CO. v. TINKHAM'S ADMX.*, Ky., 44 S. W. Rep. 439.

184. **RAILROAD COMPANY—Liability for Goods Burned.**—A deposit of goods in defendant's freight depot, with the agreement that they should be shipped, is sufficient to make defendant liable for their value when destroyed by fire, although no shipping bill or contract in writing was made.—*MELOCHE v. CHICAGO, M. & ST. P. RY. CO.*, Mich., 74 N. W. Rep. 301.

185. **RAILROAD COMPANY—Negligence.**—In the case of an accident to an employee on a switching train moving at night through a city street, mere evidence that it was caused by running into a horse which had attempted to cross a culvert, supporting the tracks, and constructed in the customary manner, with ties set some distance apart so as to deter stray animals from venturing on it, and had there become fastened or caught between the ties, is insufficient to establish

negligence on the part of the railroad company.—*BOWEN v. HOPKINS*, U. S. C. C. of App., Seventh Circuit, 84 Fed. Rep. 767.

186. RAILROAD COMPANY—Receivers—Liability of Purchaser.—Possession of railroad by receiver after sale, confirmation, deed, and expiration of time within which the court ordered delivery of the property to the purchaser, being at the instance and for the benefit of the purchaser, is as agent of the purchaser, and the latter is liable for damages to shipper occurring during the same.—*HOUSTON & T. C. R. CO. v. BATH*, Tex., 44 S. W. Rep. 595.

187. RAILROAD COMPANY—Rights of Insurance Company.—An insurance company, as intervenor in an action for damages from fire set by a railroad company, may make the allegations of plaintiff's petition, which sets forth the acts of negligence of defendant in causing the fire, that plaintiff is a corporation, and owned the property, part of its petition in intervention by way of reference, where it seeks to recover damages upon assignment of insured's right of action.—*TEXARKANA & FT. S. RY. CO. v. HARTFORD INS. CO.*, Tex., 44 S. W. Rep. 538.

188. RAILROAD COMPANY—Street Railroads—Negligence.—Evidence that, when a street car reached a point nearly opposite where the plaintiff's horses stood waiting for it to pass, they for the first time became frightened at the noise of the bell and car, and jumped forward across the track, immediately ahead of the car, so that it was impossible to stop it after the team started to run away, does not justify an inference that the motorman was negligent.—*FLAHERTY v. HARRISON*, Wis., 74 N. W. Rep. 360.

189. RAILROAD COMPANIES—Trespasser on Train.—The only duty which a railroad company owes to a trespasser on its train is to refrain from injuring him willfully or wantonly or recklessly.—*LEONARD v. BOSTON & A. R. R.*, Mass., 49 N. E. Rep. 621.

190. REAL ESTATE BROKER—Commissions.—Ordinarily a real estate broker, who, for a commission, undertakes to sell land on certain terms, and within a specified period, is not entitled to compensation for his services unless he produce to the owner a purchaser, within the time limited, who is able and willing to buy upon the terms prescribed in the contract of employment.—*LANGHORST v. COON*, Neb., 74 N. W. Rep. 257.

191. RECEIVER—Appointment.—A bill in equity to restrain trustees to whom property has been conveyed by an insolvent debtor, for the benefit of certain creditors, from disposing of the property, and for the appointment of a receiver, will not lie at the instance of other creditors, who have, in another action, sued the debtor, and garnished the trustees, when it does not appear that the trustees are insolvent, or that the property may be dissipated.—*CITY NAT. BANK OF DALLAS v. DUNHAM*, Tex., 44 S. W. Rep. 605.

192. REPLEVIN—Evidence.—Where property has been taken by distress, evidence is admissible, on behalf of one who seeks to replevin the property under a trust deed executed by the owner of the property, to show that no debt existed upon which a distress warrant could issue.—*MASHBURN v. MATHIS*, [Miss.], 23 South. Rep. 179.

193. RES JUDICATA—Collateral Attack.—A money judgment recovered in a case in which the defendant sets up a discharge in bankruptcy is conclusive, in a collateral proceeding, both of the fact of indebtedness, and that the discharge did not discharge the particular demand sued on.—*CARTER v. COUCH*, U. S. C. C. of App., Fifth Circuit, 84 Fed. Rep. 735.

194. REVIEW—Writ of.—A petition for a writ of review is addressed to the discretion of the court, and no exception lies to an order granting or denying it.—*STILLMAN v. DONOVAN*, Mass., 49 N. E. Rep. 628.

195. SALES—Conditions.—Where one agreed to sell property as soon as a certain feed account owing him by the proposed buyer should be paid, the buyer became the owner of the property when he paid the

amount of such account, though in the meantime he had bought more feed, which he did not pay for, nothing having been said as to what items the payment was to be applied to.—*WILLIAMS v. DREVER*, Tex., 44 S. W. Rep. 587.

196. SALES—Illegality.—It is competent to show that an account stated originated in an illegal transaction. Where an illegal contract for the purchase of property is made with a broker in one place, to be carried out through his correspondents in another, and the purchaser and his broker dealt as principals, the purchaser cannot recover the profits of the purchase, although it is not shown that the purchase by the correspondents is illegal.—*WAKEFIELD v. FARNUM*, Mass., 49 N. E. Rep. 640.

197. SALES—Ratification.—Where defendants sold plaintiff's tobacco without his consent, and he, after knowledge of the sale, accepted and retained his share of the proceeds thereof, without notifying defendants of objection to the sale within a reasonable time, and until after a rise in the market, he was bound by the sale.—*GIVENS v. CORD*, Ky., 44 S. W. Rep. 665.

198. SALES—Wrongful Attachment—Conversion.—An insolvent executed a bill of sale of part of his stock of goods to the agent of creditors, in payment of their claims, and possession was given at the same time. It was agreed that an inventory should be taken, and whatever surplus there was after paying the debts was to be returned to the debtor. The agent of the creditors separated the goods taken by him from the balance of the stock, but, before they could be inventoried or removed, they were levied upon by the sheriff at the suit of other creditors: Held, as against such creditors, the sale was valid.—*TRIPLETT v. MORRIS*, Tex., 44 S. W. Rep. 684.

199. SLANDER—Complaint.—A complaint alleging that defendant said of plaintiff, a female never married, that she had a miscarriage, and was about to have another, thereby intending, and being so understood, to charge her with the crime of fornication, states a cause of action.—*HIBNER v. FLEETWOOD*, Ind., 49 N. E. Rep. 697.

200. SLANDER—What Actionable Per Se.—The words, "You are not a decent woman; you do not keep a respectable house," spoken to a woman, are slanderous per se.—*LORANGER v. LORANGER*, Mich., 74 N. W. Rep. 228.

201. SPECIFIC PERFORMANCE—Contract to Make Devise.—A proposition that certain property shall be devised to another in consideration of certain services to be performed for the deviser during his life is not binding, and specific performance cannot be enforced, where there is no acceptance of its terms showing a mutual agreement thereto, although the proposed devisee may have voluntarily substantially complied with the terms thereof.—*ROSE v. OLIVER*, Oreg., 52 Pac. Rep. 176.

202. STATE AND FEDERAL COURTS—Enjoining Enforcement of Federal Judgment.—A State court has no power to impeach and nullify a decree of the circuit court of the United States, rendered in a case in which it had jurisdiction, by enjoining its enforcement, though the injunction is directed in *personam* against the parties entitled to the benefit of such decree, over whom it has jurisdiction.—*CENTRAL NAT. BANK OF BOSTON v. STEVENS*, U. S. S. C., 18 S. C. Rep. 403.

203. SUBROGATION—Payment of Mortgage.—A life tenant who pays a mortgage on the premises is entitled to be subrogated to the rights of the mortgagee; and the cancellation of the mortgage by inadvertence will not alter such right, where no other rights have been affected thereby.—*KOCHER v. KOCHER*, N. J., 39 Atl. Rep. 585.

204. SUBROGATION—Where Right Exists.—Where a son loaned his father money with which to pay assessments which were a lien on a lot, he was not entitled to be subrogated to such lien.—*KOCHER v. KOCHER*, N. J., 39 Atl. Rep. 586.

205. **TAXATION—Recovery of Payments.**—Where a lot has been sold on foreclosure of an assessment lien for street improvements, and the owner redeems the property to avoid losing title pending a suit by him to have such judgment declared void, the payment of the money necessary to redeem is not voluntary, and he may recover it back on the judgment being adjudged void.—*KEHN V. MCGILLICUDDY, Ind.*, 49 N. E. Rep. 609.

206. **TRADE MARKS—Injunction.**—A bill on behalf of an association of journeymen hatters, against manufacturers of hats, to enjoin them from using a counterfeit of the union label adopted by it, because the factory is not working under the jurisdiction of such association, cannot be sustained, where it does not allege that said association is the owner thereof, or that it is trading in, the hats or caps to which the label is applied, or has ever put them on the market.—*SCHMALZ V. WOOLEY, N. J.*, 39 Atl. Rep. 539.

207. **TRIAL—Arguments of Counsel.**—Where, in an action on a bond, defendant denies his signature, and states that he has consulted experts in reference thereto, but does not introduce them in evidence, it is within the discretion of the court to permit comment by counsel on such failure to produce.—*MCKIM V. FOLEY, Mass.*, 49 N. E. Rep. 625.

208. **TRIAL BY COURT—Findings of Fact.**—Under Code Civ. Prac. § 832, which declares that, at the request of either party, a court which is trying a case without a jury shall state, in writing, the conclusions of fact separately from the conclusions of law, such request should be made after the judgment is rendered, and within the time allowed for moving for a new trial.—*ALBIN CO. V. ELLINGER, Ky.*, 44 S. W. Rep. 635.

209. **TRUSTS—Trust Deed—Enforcement.**—A trustee of an implied trust, executing a trust deed providing that the land shall take the course prescribed by the trust, thereby so recognizes the trust that limitations will not run in his favor against the *cestui que trust*, though the trust deed is not his conveyance, because his name is not in the body of it.—*BARNETT V. HOUSTON, Tex.*, 44 S. W. Rep. 689.

210. **TRUSTS—Resulting Trust.**—Where the consideration for an absolute conveyance of land is paid by third persons, the grantee takes the title in trust for such persons, by operation of law.—*CONDIT V. MAXWELL, Mo.*, 44 S. W. Rep. 467.

211. **TRUSTS—Resulting Trust—Deeds.**—Where a purchaser obtained a complete title, and, after the vendor's death, he conveyed the land to a legatee of the vendor's claim for the price, in consideration of a release of all demands against the purchaser, the legatee did not receive the conveyance in trust for the estate, but took an absolute fee.—*O'CONNOR V. VINEYARD, Tex.*, 44 S. W. Rep. 485.

212. **TRUSTS—Resulting Trust—Evidence to Establish.**—Where it is established that the consideration for property conveyed to a wife was paid by her husband, no arbitrary rule exists as to the amount or kind of evidence required to overcome the presumption of fact that the conveyance was intended as a provision for the benefit of the wife alone; and satisfactory proof of a contemporaneous agreement that the wife should by will dispose of the property after her death in a certain manner is sufficient to raise a resulting trust in favor of the husband.—*SMITHSONIAN INSTITUTION V. MEECH, U. S. S. C.*, 18 S. C. Rep. 396.

213. **TRUSTS—Liability for Embezzlement by Attorney.**—A trustee is liable for his attorney's misappropriation of the trust funds where he permitted the attorney to collect money at various times during a period of over four years without making an effort to recover any of the sums, and retained the attorney after he should have known of his misappropriation of the trust funds.—*MCRORBERTS V. CARNEAL, Ky.*, 44 S. W. Rep. 442.

214. **TRUST DEED—When Executed.**—Where a deed conveyed to trustees property to be held by them in trust for the sole use and benefit of a married woman, the trust thus created upon the death of the husband,

even though it occurred prior to the act of 1866, became executed; and therefore, where the widow, before the passage of that act, conveyed the property to another person in trust for a child of hers, then in life, with remainder over to any child or children whom the latter might leave surviving her, her deed, though made without the intervention of the trustees named, was effectual to vest the title in accordance with the trust set out therein.—*NEW SOUTH BUILDING & LOAN ASSN. V. GANN, Ga.*, 29 S. E. Rep. 15.

215. **VENDOR AND PURCHASER—Action for Price.**—Where the vendee claimed that the vendor falsely represented that he had title, a charge that if the vendee ascertained the representations to be false, and repudiated the contract, and so notified the vendor, then the possession of the vendee, before making the contract and after repudiating it, would not be the possession of the vendor, was erroneous, as making the question of title depend on what the vendee ascertained, and not on the actual facts regarding the title.—*PUGHE V. COLEMAN, Tex.*, 44 S. W. Rep. 576.

216. **VENDOR AND PURCHASER—Recovery of Price.**—Where a grantor included public land in his deed, he is estopped thereby to deny that he undertook to convey such land, and is liable on his warranty of title.—*HYNES V. PACKARD, Tex.*, 44 S. W. Rep. 548.

217. **VENDOR AND VENDEE—Action for Price—Majinder.**—Where two notes, given for the purchase price of land, are owned by different persons, a joint action to recover on both notes, and to enforce a vendor's lien therefor, may be maintained by the two owners.—*FOSTER V. LYONS, Ky.*, 44 S. W. Rep. 625.

218. **VENUE—Right to Change.**—A co-defendant cannot sever a suit so as to be sued in the county of his residence, where the other defendant is a resident of the county wherein the suit is brought.—*WALHOEFFER V. HOBGOOD, Tex.*, 44 S. W. Rep. 566.

219. **WILLS—Contemplation of Marriage.**—A will giving all of testator's property to a certain "single woman," and making her his executrix, does not appear to be made in contemplation of marriage, within St. 1892, ch. 118, providing that, if the will shows it was so made, the marriage will not act as a revocation.—*INGERSOLL V. HOPKINS, Mass.*, 49 N. E. Rep. 623.

220. **WILLS—Defeasible Fee.**—Where a devise of certain land, under a will declaring that such devise was made "to her sole and separate use, and shall be free from the control of any husband she may marry, with remainder over to my children, in case she should die without issue," conveyed such land, her conveyance thereof passed the fee simple to her vendee, as against her surviving son, as she took, by virtue of such devise, a fee defeasible only in the event of her death without leaving issue.—*LOUISVILLE TRUST CO. V. MADDOX, Ky.*, 44 S. W. Rep. 632.

221. **WILLS—Recordation—Devises.**—Rev. St. 1890, § 8999, which provided that a copy of every will devising lands should be recorded in the county where the land was situated, being directory merely, the failure to record a will, devising land as required, does not validate the title of one claiming by mesne conveyances from the original purchaser at a tax sale under a judgment void because rendered against the testator after his death.—*WOLF V. BROWN, Mo.*, 44 S. W. Rep. 738.

222. **WITNESS—Impeachment.**—Where a witness testifies as to the value of services sued for, and on cross-examination states that he paid C a certain amount for similar services, evidence in contradiction that C was paid a less amount is admissible.—*GLASGOW V. HENBREE, Tex.*, 44 S. W. Rep. 679.

223. **WITNESSES—Competency.**—A defendant does not waive the objection that plaintiff is incompetent to testify concerning dealings with her deceased agent, where a co-defendant, acting independently of her, introduces him to formally prove his signature while dealing with such agent, and she does not object until he is asked to state the dealings in detail.—*HOLLMAN V. LANGE, Mo.*, 44 S. W. Rep. 752.